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I.A.<sup>3</sup> 17

54740

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
v. )  
 )  
WILLIE WALTON, )  
 )  
Defendant-Appellant.)

APPEAL FROM CIRCUIT  
COURT OF COOK COUNTY.

HONORABLE  
FRANCIS T. DELANEY,  
PRESIDING.


ABST.

MR. JUSTICE DRUCKER delivered the opinion of the court:

Defendant and Milton Lee were indicted for the offenses of rape (Ill. Rev. Stat. 1969, ch. 38, par. 11-1(a))<sup>1</sup> and indecent liberties with a child. Ill. Rev. Stat. 1969, ch. 38, par. 11-4(a)(1). After a bench trial defendant was found guilty of both offenses and sentenced to terms of four to five years. Lee pleaded guilty to indecent liberties and was placed on five years probation with the first year to be served in the Cook County Jail.

On appeal defendant raises the following contentions: (1) that defendant was not proven guilty beyond a reasonable doubt as the actual perpetrator of the offenses charged, nor could he be held legally accountable for the actions of his co-defendant; (2) that the State failed to establish beyond a reasonable doubt that the acts of intercourse were forcible and against the will of the complaining witness; (3) that it was reversible error for the prosecutor to continually refer to the defendant's alleged gang membership; (4) that the court improperly restricted the cross-examination of the complaining witness as to her reputation for chastity; (5) that it was error for the court to sentence defendant for both the offenses of rape and indecent liberties.

- 
1. "A male person of the age of 14 years and upwards who has sexual intercourse with a female, not his wife, by force and against her will, commits rape."
  2. "Any person of the age of 17 years and upwards who performs or submits to any of the following acts with a child under the age of 16 commits indecent liberties with a child:
    - (1) Any act of sexual intercourse; \* \* \*."



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The following is a summary of the testimony given at the trial:

Barbara Walker, the complaining witness, testified for the State. She was 13 years old when the alleged incident occurred. On the evening of May 28, 1969, she and two girl friends, Yvonne Young and Virginia Haley, were walking down 15th Street near Lawn-dale Avenue in Chicago. (Other testimony showed the time to be around 9:30 P.M.) They met the defendant and some other boys they knew. They talked for a while and continued walking to 15th and Ridgeway where they met "Cat Eyes" who was subsequently identified as Milton Lee. Cat Eyes grabbed the witness and told her she was going to stay with him that night and that he wouldn't turn her loose. Another boy, Chester, grabbed Virginia Haley but she broke loose and ran down the street with Yvonne Young. Chester ran after them, leaving the defendant, Cat Eyes and Barbara behind; Cat Eyes was still holding her wrist. At some point during this time the defendant told her, "I am going to tell you what I want right now; I want some pussy." Cat Eyes then took her through a gangway behind a nearby drugstore to the rear of an apartment building. He tried to have intercourse with her there but a tenant, a little boy, came out of the first floor apartment, so Cat Eyes took her across an alley to the basement door of an apartment building. They waited for the defendant, who was coming from behind, because Cat Eyes said that the defendant knew how to get in. The defendant opened the door although the witness didn't see whether he used a key. Cat Eyes then took her through a series of doors. It was very dark. He told her to get up on a bed in the room and "then he had sex with me." She had no panties on at the time because Cat Eyes told her to take them off when they were at the rear of the other apartment building; she had left them there. After Cat Eyes had intercourse with her the defendant did also. The defendant didn't take off his clothes, he just opened his pants. The two boys then





took her out of the apartment. She ran home and met Virginia Haley and Yvonne Young on the sidewalk. She told them that Cat Eyes and the defendant had raped her. She contacted her brother who in turn contacted her mother. When her mother came she (her mother) called the police. Two officers came and Barbara gave them descriptions of Cat Eyes and the defendant. Barbara, her mother and the officers drove around the neighborhood looking for the boys. They found the defendant standing on the steps of a building with some boys. He was then arrested. On cross-examination the witness stated that when Cat Eyes took her through the door to the back of the drugstore, the defendant stood outside. She had hesitated to take off her panties but Cat Eyes "just put his foot down and he took them off." The first time defendant touched her was when she had finished having intercourse with Cat Eyes; the defendant then "pushed her back down on the bed." She never screamed but did moan. She did not scream when the young boy from the first apartment building came outside; she never screamed when Cat Eyes grabbed her on the street; she never fought with him; she did tell him to turn her loose but he refused; she never called out for help; there were no marks on her body. She thought the defendant was in the basement apartment while she was in the room with Cat Eyes. Defense counsel then asked her if she was a virgin at the time but an objection to the question by the Assistant State's Attorney was sustained. The witness then stated that the basement apartment was "completely dark." She knew it was the defendant who had intercourse with her after Cat Eyes because "he pushed me back down on the bed." She knew it was not somebody else because she didn't hear anyone else come in. She could not see the defendant. On re-direct she stated that she never screamed while in the basement apartment because the members of the gang which defendant and Cat Eyes belong to hung around there and she thought that if she screamed some of them



might come and rape her. There was a difference between the two men who had intercourse with her, Cat Eyes was heavier than the second person. On re-cross examination the witness stated that she could not be sure whether there was anybody in the basement before she got there.

Yvonne Young testified for the State. She essentially corroborated Barbara Walker's testimony as to what occurred when they were walking home that evening. She further testified that the next time she saw Barbara was on the sidewalk about five or ten minutes later. She and Virginia Haley asked Barbara what had happened. Over the objection of defense counsel, the witness was permitted to state that Barbara told them that Milton (Cat Eyes) and the defendant had raped her. On cross-examination Yvonne stated that she never saw the defendant touch Barbara. She saw Cat Eyes grab Barbara but she never told any adult that this was happening. She never heard Barbara scream; she never saw the defendant converse with Barbara. When she saw Barbara on the sidewalk Barbara's hair was messed up but she saw no marks or bruises.

Jessie Mae Walker testified for the State. She is the mother of the complaining witness. After she talked to her daughter on the evening in question, she called the police. Two officers subsequently arrived at her house. Thereafter she and her daughter drove around the neighborhood in a squad car with two police officers. They saw the defendant standing with five or six boys on the street. Her daughter pointed to one of the boys whom Mrs. Walker identified as the defendant. When the defendant was put in the squad car, he stated, "I told Lee not to do it and now he got us into trouble."

Alphonso Carter, a Chicago police officer, testified for the State. In response to a call on the evening in question he





proceeded to a location where he met Mrs. Walker and her daughter. He corroborated the testimony of Mrs. Walker as to what occurred at the scene of the arrest. After Cat Eyes was arrested and the complaining witness taken to a hospital for examination, Carter and the complaining witness went to the side hallway of 1553 South Ridgeway. Her panties (People's Exhibit No. 1) were recovered there. They proceeded to 1536 South Lawndale where Barbara identified it as the place where the acts of intercourse took place. The door to the basement was locked. On cross-examination Carter stated that he first arrived at the Walker home at about 10:00 P.M. The complaining witness gave a statement to him which in essence was the same as her in-court testimony. She appeared to be in a state of shock but he saw no bruises on her face or arms nor were her clothes torn. There were no stains on the panties recovered in the hallway. She had described the defendant as wearing a black tam hat with a blue jean suit. He was wearing clothes matching this description when arrested. When Carter and the complaining witness went to the basement door at 1536 South Lawndale, he couldn't see much of anything, "It was so dark." When the defendant was searched after the arrest, a set of keys was recovered. None of these keys opened the door to the locked basement door. Carter believed that the defendant and Cat Eyes had the same build but Cat Eyes was taller; there was no visible difference in their weights.

Clarence Hancock, Jr., a Chicago police officer, testified for the State. He was working with Alphonso Carter on the evening in question. It was stipulated that his testimony would be essentially the same as that of Officer Carter.

Dr. Asuncion Imperial, a specialist in gynecology and obstetrics, testified for the State. At midnight on May 28, 1969, she conducted a vaginal examination of Barbara Walker. The exam-



ination revealed a fresh laceration of the hymen. A laboratory examination revealed the presence of spermatozoa. On cross-examination she stated that she also made a complete physical examination of the complaining witness but found no external injuries. The hymenal tear was not severe but it did indicate the use of some force, but not excessive force.

Larry Rutledge testified for the defense. He is a friend of the defendant. At about 7:30 or 8:30 P.M. on May 28, 1969, he and Charles Baker ("Shorty") were in the basement of the apartment building at 1536 South Lawndale. Milton Lee, the defendant and Barbara Walker came in; he heard them talking and then Milton and Barbara went into a room. He and Shorty came out to the front room and asked the defendant "who was there?" The defendant answered, "Milton and Barbara." Milton then came out of the room and Rutledge went in the room and had intercourse with Barbara. He did not take his clothes off but just unzipped his pants; she didn't say anything, "she put it in." He was standing next to the defendant at all times except when he was with Barbara and never saw the defendant go into the room with her. On cross-examination Rutledge stated that one doesn't need a key to get into the basement; the door has never been locked. He arrived at the basement at 8:30, not 7:30. Barbara came into the basement at 9:00 P.M. or 9:30 P.M. Rutledge and Shorty were hiding; they were going to scare them when they came in; "you could hear somebody when they are coming in." He and Shorty had been smoking cigarettes and listening to the radio until the three people arrived. While Barbara and Milton were in the room he told the defendant, "I was going in next." He was in the bedroom with Barbara for five minutes. The door to the bedroom was open but one couldn't see in it from the front room because it was dark. The defendant was not wearing a tam hat; he was



wearing some pants and a shirt. He had known Milton Lee for about two months but had never heard anyone call him "Cat Eyes."

Barbara Fletcher testified for the defense. The complaining witness had told her that she was 17 during a conversation in November, 1968. She has seen the complaining witness at a recreation center where one has to be 16 to be admitted.

Paul Magee testified for the defense. He resides in an apartment at 1536 South Lawndale. A little after 7:30 P.M. on the evening in question Magee went outside and met with some friends, "such as Charles Baker ("Shorty"), [the defendant] \* \* \*." Between 9:00 and 9:30 the complaining witness, Virginia Haley and Yvonne Young walked by. He heard no threats made. The defendant walked the girls to the corner and said he was going to walk them halfway home. The defendant neither threatened nor touched any of them. The defendant returned about 15 minutes later. On cross-examination he stated that the door to the basement was not locked. He didn't recall seeing Larry Rutledge with the group of boys outside the apartment building. "He [Rutledge] could have [been there], but I am not positive." There are five rooms in the basement; two of them are bedrooms. There are no lights. He was present when the defendant was arrested. He remembered the defendant saying "What I done?" before he got into the squad car. He believed that Charles Baker (Shorty) was outside with the group of boys during the evening. On re-direct he stated that he wasn't sure whether Shorty was with him that night.

The defendant testified in his own behalf. On the night in question he did not have intercourse with Barbara Walker; he did not force her to have intercourse with Milton Lee; he never touched her. On cross-examination the defendant stated that he was 18 years old on the date of the alleged incident. He was in





the basement at 1536 South Lawndale with Barbara Walker, Milton Lee, Charles Baker and Larry Rutledge during the evening. Previous to that time he was out on the porch talking with some friends. Charles Baker (Shorty) was not out there. He first saw Milton Lee when he was walking Barbara, Virginia and Yvonne home. Chester Crawford and Chester's brother were with Milton. He did not converse with the girls. Chester talked to Virginia and Milton talked to Barbara. He left them and went to a drugstore. After going to the store he returned to the basement at 1536 South Lawndale. He did not pass by the porch where he had been earlier while talking with his friends. There was nobody in the basement so he left. He subsequently returned to the basement and entered it along with Milton Lee and Barbara. Larry Rutledge and Charles Baker were also there. He talked only to Barbara, Larry and Charles. He denied that when he was arrested he had said, "I told Cat Eyes not to do it, now he has got us both in trouble."

James Crowder testified for the defense. The complaining witness has told him on several occasions that she was 17 years old. Over the objection of the Assistant State's Attorney he stated that he had had sexual relations with the complaining witness; he paid her no money.

Alphonso Carter was called on rebuttal by the State. When he first saw the defendant prior to making the arrest, the defendant took a black tam cap off his head and dropped it to the ground. The defendant also backed up and tried to hide behind some of the boys he was with.

### Opinion

Defendant first contends that he was not identified beyond a reasonable doubt as the actual perpetrator of the crimes charged. The State, however, argues that it is unnecessary to respond to this contention since the defendant may be held legally accountable for the actions of his co-defendant Milton Lee.



The accountability statute (Ill. Rev. Stat. 1969, ch. 38, par. 5-2) provides in relevant part:

A person is legally accountable for the conduct of another when: \* \* \*

(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.

Case law has established that where circumstances demonstrate that there is a common design to do an unlawful act to which all assent, whatever is done in furtherance of the design is an act of all, and all are guilty of whatever crime is committed. People v. Brendeland, 10 Ill.2d 469, 471, 472, 140 N.E.2d 708; People v. Nowak, 45 Ill.2d 158, 169, 258 N.E.2d 313.

In the instant case there is ample evidence, if believed by the trier of fact, showing that Lee and the defendant had a common design to have intercourse with the complaining witness; it is undisputed that Lee did in fact have intercourse with her. Both the defendant and Lee made statements to the complaining witness during their initial encounter on the street to the effect that they desired to have sexual relations with her. The complaining witness testified that the defendant stood outside a door when Lee took her to the rear of the first apartment building; that when she and Lee reached the locked basement door they waited for the defendant because he knew how to open it. There is no doubt that the defendant was present in the basement when Lee had intercourse with the complaining witness. The defendant's version was that when he returned to the basement for the second time he by chance arrived at the same time as did the complaining witness and Milton Lee. This testimony is contradicted by the testimony of the complaining witness and also the testimony of two witnesses who stated that when the defendant was arrested he began sobbing and stated, "I told Lee not to do it and now he got





us into trouble." We therefore conclude that the defendant is properly held accountable for the acts of Milton Lee.

But defendant contends that the conviction for rape must be reversed because the State failed to establish beyond a reasonable doubt that Lee's act of intercourse was done forcibly and against the will of the complaining witness. A preliminary evidentiary issue we must address ourselves to is the admissibility of the statement made by the complaining witness to her two girl friends after the acts of intercourse to the effect that she had just been raped by the defendant and Milton Lee. The statement is admittedly hearsay but the issue is whether it comes within the "spontaneous utterance" exception to the hearsay rule and therefore is nevertheless admissible to show the truth of the matter asserted therein. The trial court felt that the statement did come within the exception and allowed it into evidence. We agree with this determination. The statement was made moments after the acts of intercourse, while the complaining witness was walking home. She was crying when she approached her girl friends on the sidewalk. They asked her, "What happened?" to which she responded that she had just been raped by the defendant and Lee. Defendant argues that since the statement was made in response to a question, i.e., "What happened?" it lacks the element of spontaneity. He cites People v. Taylor, 48 Ill.2d 91, 97, 268 N.E.2d 865, 867, wherein the court stated:

We held that to be admitted as a spontaneous statement it must not have been made as a result of questions \* \* \*.

However, in Taylor the complaining witness' statement was made only after the persistent questioning of a fireman and after the complaining witness had walked away from him for a moment. The court carefully distinguished the factual situation it was faced with from that of People v. Damen, 28 Ill.2d 464, 193 N.E.2d 25.



In Damen the complaining witness had made a statement to the police in response to the question, "What happened?" The court held that this single question was insufficient to destroy the spontaneity of the subsequent statement. We believe the facts of the instant case fall within the situation presented in Damen and therefore no error was committed by the trial court in admitting the statement of the complaining witness into evidence and considering it for the truth of the matter asserted therein.

We also believe that the evidence shows that Lee's act of intercourse was done forcibly and against the will of the complaining witness. Defendant has cited People v. Faulisi, 25 Ill.2d 457, 185 N.E.2d 211; People v. Qualls, 21 Ill.2d 252, 171 N.E.2d 612; People v. Scott, 407 Ill. 301, 95 N.E.2d 315; and People v. DeFrates, 33 Ill.2d 190, 210 N.E.2d 467. We deem it sufficient to say that these cases are all factually distinguishable from the instant case. They stand for the general proposition that where the testimony of the complaining witness is not clear and convincing, other corroborating evidence must be presented to sustain a conviction for rape. Even if her testimony were to be considered less than clear and convincing, we believe that sufficient corroborating evidence was presented to sustain the conviction. This evidence consisted of her immediate outcry of rape to her two girl friends (see People v. Strong, 120 Ill. App.2d 52, 59, 256 N.E.2d 76), the admission of the defendant, and the medical testimony of Dr. Imperial who made a vaginal examination of the complaining witness and stated that the hymenal tear discovered indicated the use of some force. See People v. Putney, \_\_\_\_\_ Ill. App.2d \_\_\_\_\_, 271 N.E.2d 685, 688.

Defendant argues that the failure of the complaining witness to scream when she was taken to the rear of the first apartment building, and when she was in the basement of the second building,



precludes the possibility that the acts of intercourse were done forcibly and against her will. The 13 year old girl explained that her failure to scream when in the basement was due to her fear of being raped again by other boys who might have been nearby. She apparently was also fearful of Milton Lee when he took her panties off at the rear of the first building. She initially refused to take them off but Lee "put his foot down" and took them off himself. Considering the record as a whole we are not able to say that the decision of the trier of fact, who was in a position to see and hear the witnesses, was so unreasonable as to require the reversal of the rape conviction.

Although not essential to affirming defendant's conviction for rape, we feel it worthy to mention that there was sufficient evidence identifying the defendant beyond a reasonable doubt as the second person who had intercourse with the complaining witness. The complaining witness testified that defendant told her of his desires during their encounter on the street; that the defendant stood outside a door when Lee took her to the rear of the first apartment building; that he opened the door to the basement; and that she neither saw nor heard anyone else in the basement during the relevant time. Larry Rutledge's testimony that he was the second person to have intercourse with the defendant was evidently disbelieved by the trier of fact. Rutledge first testified that he entered the basement at 7:30 P.M.; he subsequently changed this to 8:30 P.M. He said he had been in the basement for two hours with Charles Baker. However, Paul Magee testified that he thought Baker was outside with the group of boys at the time. Rutledge testified that the defendant was wearing "some pants and a shirt"; the complaining witness told Officer Carter that defendant wore a black tam hat and a blue jean outfit; the defendant was wearing an outfit matching the complaining witness'





description when arrested. It may be stated without citation that issues of credibility are to be determined by the trier of fact. The complaining witness' testimony if believed clearly identifies the defendant beyond a reasonable doubt as the second person who had sexual intercourse with her. Evidence set forth earlier relating to the consent issue would apply equally as well to the defendant's act of intercourse. Therefore, regardless of the accountability theory, we believe that defendant's conviction for rape was a proper one.

Defendant next contends that certain references to defendant's gang membership constituted reversible error. We first note that no objections were made at the trial to questions concerning the gang membership; nor was this point raised in defendant's extensive oral motion for a new trial. Therefore, any alleged error as to this issue is waived. People v. McCasle, 35 Ill.2d 552, 557, 221 N.E.2d 227. Furthermore, the fact that the basement at 1536 South Lawndale was a place where gang members allegedly met was relevant to the issue of consent. The complaining witness stated that she made no effort to scream while in the basement for fear that other boys would come in and rape her.

Defendant's next contention is that the court erred in restricting the cross-examination of the complaining witness as to her reputation for chastity. Specifically, defense counsel asked her whether she was a virgin at the time of the incident. An objection to the question was sustained on the ground that her virginity was irrelevant to the issue of consent and that only evidence pertaining to her general community reputation for chastity or immorality was admissible as to this issue. The trial court's ruling was correct. As stated in People v. Griffin, 76 Ill. App.2d 326, 222 N.E.2d 179 (abst.):



It is the rule in Illinois that a defendant in a rape case may introduce evidence of a complainant's general reputation in the community as tending to prove her consent, but he may not adduce evidence of specific incidents of unchastity. *People v. Cox*, 383 Ill. 617, 50 N.E.2d 758; *People v. Collins*, 25 Ill.2d 605, 186 N.E.2d 30. Defendant's counsel sought to question the prosecutrix as to specific acts of intercourse with other men. The trial court was correct in sustaining the State's objections.

Without citing authority for the proposition, defendant argues that a 13 year old girl is not old enough to have established a reputation for unchastity. We do not agree. In fact, the defense presented a witness, James Crowder, who seemingly could have testified as to the issue if questioned properly.

Defendant next contends that the court erred in sentencing a "clearly more culpable co-defendant," who pleaded guilty, to a less severe sentence than the defendant who stood trial. Milton Lee, the co-defendant, pleaded guilty to indecent liberties with a child and was placed on five years probation with the first year to be served in the County Jail. The defendant received two sentences of four to five years. While we are sympathetic to defendant's position, there is little we can do for him. By statute (Ill. Rev. Stat. 1969, ch. 38, par. 117-1) the courts are prohibited from placing a defendant convicted for rape on probation. This is not the case where the conviction is for indecent liberties with a child. Defendant received a minimum sentence of four years. This was the minimum sentence permitted under the rape statute. Ill. Rev. Stat. 1969, ch. 38, par. 11-1(c). Therefore the four to five year sentence for rape must stand.

Defendant's final contention is that he was sentenced on both the charges of rape and indecent liberties for the same conduct. He states that the mittimus shows that he was sentenced to two concurrent terms of four to five years for the offenses of rape and indecent liberties. It is undisputed that the defendant could



only be sentenced for one of the charges. See People v. Garcia, 86 Ill. App.2d 80, 230 N.E.2d 289 (abst.). Cert. den. 393 U.S. 889. We believe the report of proceedings reveals that the court intended only to sentence defendant on the charge of rape.

The judgment finding defendant guilty of rape and sentencing him to four to five years is affirmed. The judgment finding him guilty of indecent liberties and sentencing him to four to five years is reversed.

AFFIRMED IN PART;  
REVERSED IN PART.

Lorenz, P.J., and English, J., concur.

Abstract only.





## UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable THOMAS J. MORAN, Justice  
Honorable MEL ABRAHAMSON, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

May 24, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



FILED

No. 72-43

MAY 2 1972

HOWARD H. KELLEY, Clerk  
Appellate Court, 2d District

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

Abstract

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PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	Appeal from the Circuit
vs.	)	Court of the Eighteenth
	)	Judicial Circuit,
CARL SAM MULE,	)	DuPage County, Illinois
	)	
Defendant-Appellant.	)	

---

PRESIDING JUSTICE SEIDENFELD delivered the opinion of the Court:

The defendant, Carl Sam Mule, was charged in the one count indictment of the crime of forgery in violation of IllRev.Stat. 1969, ch.38, par.17-3(a)(2).

Represented by the public defender, defendant was given leave to withdraw his plea of not guilty and to enter a plea of guilty to the indictment after negotiations with the State's Attorney. After inquiring into the negotiated plea with a recommendation of not less than two and one-half nor more than four years in the penitentiary, the trial court admonished the defendant and accepted his plea of guilty; defendant waived his right to a hearing in aggravation and mitigation and the court sentenced him to the recommended 2½ - 4 years. (In the proceedings a separate, unspecified charge against Mule was nolle prossed)

A public defender appointed on appeal now asks leave to withdraw, stating that after a searching review of the record only illusory issues are present related to the admonishment and to the question of the voluntariness of the plea.



The motion to withdraw is granted. From our examination of the record, we agree that the appeal is frivolous and without merit. At the time of accepting the plea the court included in its admonishment defendant's right to have a trial by jury. The fact that the court did not specifically refer to the waiver of a trial by the court is not ground for reversal. See The People v. Wallace, 48 Ill.2d 252, 253 (1971). Likewise, it clearly appears from the record that the plea of guilty, in accordance with the plea negotiations, was voluntarily and intelligently entered. The fact that the court failed to inform the defendant that he was not bound by the terms of the plea negotiation agreement in accordance with Supreme Court Rule 402, is not a ground for reversal since the court sentenced the defendant in exact accord with the agreement.

The judgment below is affirmed.

LEAVE TO WITHDRAW AS COUNSEL  
GRANTED, AND JUDGMENT AFFIRMED.

ABRAHAMSON and MORAN, J.J. concur.





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I.A.<sup>3</sup> 101

56674

PEOPLE OF THE STATE OF ILLINOIS, )

Plaintiff-Appellee, )

vs. )

ARTHUR NEAL FOSTER, )

Defendant-Appellant. )

APPEAL FROM THE  
CIRCUIT COURT  
OF COOK COUNTY.

HONORABLE  
MINOR K. WILSON,  
PRESIDING.

ABST.

MR. JUSTICE LYONS delivered the opinion of the court:

Following a trial by jury Arthur Neal Foster was convicted of the offense of murder (Ill. Rev. Stat. 1967, ch. 38, par. 9-1). Judgment was entered on the verdict and he was sentenced to a term of not less than 20 nor more than 30 years in the Illinois State Penitentiary. On appeal he contends that the testimony of two occurrence witnesses should have been suppressed and that he was not proven guilty beyond a reasonable doubt.

The evidence presented by the State established that between 6:30 and 7:00 P.M. on June 21, 1969, John DeJulio was beaten and robbed in the alley behind 4320 S. St. Lawrence Avenue, Chicago, and that he subsequently died of the injuries. Three witnesses to the assault identified the defendant as the offender. Defendant took the stand on his own behalf to establish an alibi defense, testifying that he was not in the neighborhood of the crime on the date in question. The prosecution countered defendant's alibi testimony with that of a rebuttal witness. She testified as to having seen the defendant in the immediate vicinity immediately after the time the offense was proven to have been perpetrated. Defendant's alibi testimony was also rebutted by a portion of an occurrence witness' testimony to the effect that he saw defendant on the street several hours after the crime.

Defendant has raised issues with respect to the pre-trial viewings made by two witnesses to the homicide. The first of these witnesses, Geraldine Morris, had not viewed the defendant subsequent



to his arrest. At the hearing on defendant's motion to suppress identification testimony, defense counsel requested and the court ordered that a lineup be conducted in order that Geraldine Morris' first viewing of defendant be free of whatever suggestive influences might attend a courtroom showup. Defendant concedes that the lineup was fairly conducted. Prior to the witness having viewed the lineup, however, she was shown a series of photographs, defendant's included. Defense counsel was not previously advised that such a showing would be made and consequently did not attend. It is here urged that the showing of photographs to the witness was a critical confrontation which required the presence of defense counsel, and that its being conducted in the absence of counsel served to deny defendant his constitutionally protected right to effective assistance of counsel. It is upon this alleged denial that defendant founds his assertion that the testimony of the witness Morris as to the viewing of photographs should have been suppressed.

It would appear that the issue of whether the showing of photographs was a critical confrontation requiring the presence of defense counsel under the mandate of *United States v. Wade*, 1967, 388 U.S. 218 and *Gilbert v. California*, 1967, 388 U.S. 263, was determined adversely to defendant in *People v. Holiday*, 1970, 47 Ill.2d 300, 265 N.E.2d 634. However, we need not decide that question since it appears from our review of the record that the prosecution did not elicit testimony from Miss Morris at trial concerning her viewing of either the photographs or the lineup. Her only testimony with respect to either of these procedures was in response to the cross-examination undertaken by defense counsel.

Defendant has also complained of the witness Robert Samuels having been allowed to testify with respect to his having viewed defendant under the allegedly prejudicial circumstances attendant



the coroner's inquest, where defendant entered the hearing room under heavy and uniformed escort. Although defendant's motion to suppress such testimony was denied, the record establishes that the State proceeded as if it had been allowed. Mr. Samuels did not testify regarding his having viewed the defendant at the coroner's inquest.

In the interest of affording defendant a complete review of all questions presented to the trial court regarding the viewings by these two witnesses, we next consider whether their identification testimony should have been suppressed in toto as tainted by the police procedures complained of, although this point has not been specifically raised or argued in this court. Even if we were to assume that the viewing of the photographs by Miss Morris and of defendant himself at the coroner's inquest by Mr. Samuels were themselves improper and violative of defendant's rights, we would nevertheless be forced to the conclusion that their in-court identification testimony was properly admitted into evidence. Their testimony established a substantial basis from which to conclude that there existed an independent basis for the in-court identifications, (see *People v. Fox*, 1971, 48 Ill.2d 239, 269 N.E. 2d 720) as both of these witnesses were afforded an excellent opportunity to observe the offender during the course of the attack upon the deceased. In addition, Mr. Samuels testified that he recognized the defendant at the time of the offense as a person whom he had previously seen in and about the neighborhood on numerous occasions.

Defendant's final contention is that he was not proven guilty beyond a reasonable doubt. In support thereof he argues: (a) that substantial differences exist between the descriptions of the offender given the police by the occurrence witnesses; (b) that the procedure under which he was identified (by photograph) was inherently untrustworthy; (c) that the witness called by the State to rebut his alibi testimony was inherently untrustworthy;





(d) that an adverse inference arises from the State's failure to call a particular witness who apparently could have corroborated the testimony of the State's rebuttal witness; and (e) that an adverse inference arises from the State's failure to conduct a lineup other than the one ordered by the court and viewed by only one of the occurrence witnesses. He contends that all of these factors in combination serve to create a reasonable doubt of guilt.

Once again our review of the record has proven fatal to defendant's contention. The only witness who testified at trial as to a description of the offender given to the police was Geraldine Morris. She testified that the description which she gave to the investigating officers included an estimate of the offender's height as at least 5'6 or 7". Another occurrence witness, Hilda Floyd testified at trial that the offender was 5'6 or 7", however, she also testified that the offender was slightly taller than the deceased, who, according to the coroner's pathologist, Dr. Kearns, who testified as to the cause of death, was 5'8" in height. Defendant himself testified that he is 5'9" tall.

Defendant's contention that an identification by photograph is inherently untrustworthy is without merit. While it has been judicially recognized that this type of identification procedure is inferior to a personal confrontation such as a lineup and that the latter is preferred, we are aware of no authority to the effect that a photographic identification is worthy of no consideration. Moreover, this argument ignores the in-court identifications made by three occurrence witnesses, two of which have been challenged on constitutional grounds and which we have found to have been properly admitted.

Defendant also contends that certain facts of a personal nature revealed by Brenda Harris when called by the State to rebut his alibi testimony demonstrate her untrustworthiness as a witness. It is true that from her testimony certain inferences might be drawn concerning this witness' moral turpitude as measured by



contemporary standards, and that if drawn, such inferences would reflect upon her credibility as a witness. We do not find, however, that such inferences necessarily follow from her testimony. Neither do we believe that such inferences, if drawn, totally destroy her credibility as a witness. The jury's apparent refusal to disregard her testimony was not unreasonable.

Finally, no adverse inferences arise from the State's failure either to conduct a lineup or call a witness who may have been able to corroborate the testimony of Miss Harris. The State is under no obligation to conduct a lineup or call all possible witnesses. Thus, no adverse inference necessarily arises from the failure to do so. See *People v. Jones*, 1964, 30 Ill.2d 186, 195 N.E.2d 698. The judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J. and BURKE, J., concur.



*Ben Brown*



I.A.<sup>3</sup> 106

ABST.

56655

SUE SINARD, )  
Plaintiff-Appellee, )  
vs. )  
IRVIN J. SINARD, )  
Defendant-Appellant.)

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.  
HON. SIDNEY A. JONES, Jr.  
Presiding.

MR. JUSTICE BURKE delivered the opinion of the court:

Plaintiff was granted a divorce from defendant in June of 1970. The decree provided in part that plaintiff be awarded custody of the parties' then eighteen year old son, that she be awarded the marital home and all its furnishings in lieu of alimony, and that defendant pay the sum of \$75 per week toward the college expenses of their son until he shall have completed four years of college. No appeal was taken from that decree.

On June 11, 1971 defendant filed a pro se petition for the modification of the divorce decree, requesting in essence that he be awarded custody of the parties' son and that the support payments provided for in the decree be reduced. The petition alleged that plaintiff was financially able to share the responsibility of raising the parties' son and of providing for his college education but that she was not capable of managing the son's educational expenses, that the defendant received notice of termination of his employment from his employer, and that he was unable to provide the support payments required by the decree. The petition prayed for entry of a "judgment" in ten respects.

On June 15, 1971 the petition to modify the decree was called for hearing at which plaintiff appeared represented by counsel, and defendant appeared pro se. (Defendant is not a lawyer.) The trial court questioned both the defendant and the plaintiff concerning the





parties' son and questioned the defendant concerning his employment at the time of the hearing. Without hearing evidence as to the financial conditions of either the plaintiff or the defendant, the court reduced the support payments required of the defendant to \$150 per month and denied the petition with regard to the request for a change in the custody of the parties' son. Defendant there upon requested "a full hearing" and offered to the court citations to authority in support of his request. The trial court stated in response to defendant's request, "You have had as much hearing as I am going to give you, sir" and "I have given you a full hearing, that's all. You had a hearing. \* \* \* See all these other people here. You had a hearing. Next case."

On July 7, 1971 defendant filed a supplemental petition requesting a hearing on the June 11th petition and seeking to correct certain alleged mistakes in the divorce decree. Hearing on the supplemental petition was continued to July 21, 1971 and an order was entered providing that both parties and the minor child be present in court for that hearing and that certain records pertaining to the child's college expenses, etc., be brought into court.

On July 14, 1971 defendant filed a motion for a rehearing on the June 11th petition and for vacation of the order of June 15th. On the same day an order was entered allowing a hearing on the motion for rehearing and further reciting that plaintiff bring certain evidence into court relating to the parties' child.

On July 21, 1971 the matter was continued for hearing until August 23, 1971, but on August 13, 1971 defendant filed a motion to advance all matters for hearing, which was allowed by the trial court.

Hearing on the motion for rehearing of the petition and vacation of the June 15th order, on the motion to advance all matters for hearing



and on the supplemental petition was held on August 18, 1971. Plaintiff again appeared represented by counsel and defendant again appeared pro se. After several preliminary questions were asked of the defendant by the trial court concerning the nature of relief sought by his petition, the defendant stated to the court that he had prepared his presentation for the hearing and that his "hearing testimony and evidence will take at least a full hour." A colloquy then took place off the record after which the court denied the defendant's request for change in the custody of the parties' child. The court then either allowed or denied, seriatim, each of the remaining prayers for relief contained in the petition, without hearing evidence, after which the defendant stated, "Let the record show that I have not had a hearing." An order was drawn in accordance with the several holdings of the trial court, and the order was entered by the court on August 20, 1971. The order also restrained defendant from "filing further petitions relating to all matters which are the subject matter of this order and which have been ruled on by this Court."

Defendant appeals from the orders of the trial court entered on June 15 and August 20, 1971. He contends, inter alia, that he was not accorded a complete hearing on the matters contained in his petition and his supplemental petition. Plaintiff has filed neither an appearance nor a brief in this Court.

A review of the record reveals that defendant was not allowed a hearing on the question of child support payments as he requested. As was pointed out in the case of *Regan v. Regan*, 38 Ill.App.2d 383, 187 N.E.2d 286, where a hearing is requested, the pressure of the court's business notwithstanding, a hearing must be allowed. The



56655

trial court in the instant case erred in not allowing the defendant an opportunity to present his evidence and to examine plaintiff, if desired, on the question of the support payments.

It should be noted that the trial court did not abuse its discretion in denying defendant's petition as to the change in custody of the then nineteen year old college student child of the parties.

For these reasons the portions of the orders of June 15, 1971, and August 20, 1971 relating to the support payments are reversed and the cause is remanded with directions to allow defendant a hearing on that question. Order Number 12 of the August 20, 1971 order, restraining defendant from filing further petitions in this action, is also reversed. The remaining portions of both the June 15 and the August 20, 1971 orders are affirmed.

ORDERS REVERSED IN PART AND AFFIRMED IN  
PART, AND CAUSE REMANDED WITH DIRECTIONS.

GOLDBERG, P.J., and LYONS, J., concur.





3a 6200

6 I.A.<sup>3</sup> 108



56505

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE	<b>ABST.</b>
Plaintiff-Appellee,	)	CIRCUIT COURT	
vs.	)	OF COOK COUNTY.	
ARNOLD DIXON,	)	HONORABLE	
Defendant-Appellant.	)	GEORGE E. DOLEZAL, PRESIDING.	

MR. JUSTICE LYONS delivered the opinion of the court:

Arnold Dixon was tried by jury and convicted of the offense of robbery (Ill. Rev. Stat. 1967, ch.38, par.18-1). Judgment was entered on the verdict and he was sentenced to a term of not less than two nor more than five years in the Illinois State Penitentiary. On appeal he contends:

- 1) That the trial court committed reversible error in allowing the jury to hear and consider evidence relating to a pre-trial identification;
- 2) That he was denied a fair trial when the court refused to give his tendered instruction on alibi defense;
- 3) That he was not proven guilty beyond a reasonable doubt; and
- 4) That the trial court's refusal to admit him to probation was arbitrary and an abuse of discretion.

Mrs. Linda Dalsiel testified that on December 25, 1968, she was employed as an airline stewardess. She was returning to her apartment at 1435 North Dearborn, Chicago, at approximately 6:30 P.M. when she noticed a man dressed in dark clothing in an empty lot near the building in which she lived. When she entered the vestibule of her apartment building, she realized that a man had followed her. She turned to face him and he inquired as to whether a certain party resided in the building. When she informed him that no such person lived there, he demanded that she surrender her wallet. At this time he had his hand in his coat pocket and was pointing the hand toward her as if holding a gun. She complied with the demand, turning over the wallet and its



contents, \$135 in cash and her identification. After admonishing her not to scream, the man, defendant, left the building. She was able to view him for a period of approximately three minutes in the close confines of the well-lighted vestibule.

Following the robbery, she proceeded to her apartment from which she telephoned the police and reported the incident. She described the offender to them as a Negro male, taller than herself, and dressed entirely in black, including a black hat.

Mrs. Dalsiel also testified that on January 7, 1969, she went to the police station to view some photographs. After viewing approximately 50, she made a positive identification of defendant's photo. A police officer requested that she continue to view photographs after having made the identification in order to insure that she was not mistaken. She ultimately viewed some 600 photos. Finally, Mrs. Dalsiel testified to having identified defendant during the course of a five man lineup conducted at Central Police Headquarters on January 16, 1969.

The testimony of Officer Gary Hettinger corroborated that of Mrs. Dalsiel with respect to her pre-trial identifications of defendant as the perpetrator of the offense.

Defendant first argues as grounds for reversal the trial court's admission into evidence testimony relating to the lineup identification. He contends that the lineup was a critical stage of the proceedings against him and that therefore no evidence arising therefrom should have been admitted against him, as he was without the benefit of counsel at that time. In presenting this argument defendant, in effect, urges this court to ignore the decision in the case of *People v. Palmer*, 1969, 41 Ill.2d 571, 244 N.E.2d 173 wherein it was held that a pre-indictment lineup, such as is here at issue, is not a critical stage of the proceedings against the accused and that therefore the right to the assistance of counsel does not attach thereto. This, of



course, we are not at liberty to do.

Were we free to conclude that the lineup testimony was erroneously admitted, no different result would follow, for we would also conclude that the error occasioned by its admission was harmless beyond a reasonable doubt. Even if the testimony regarding the lineup identification is not considered, there remains substantial and damning evidence on the question of the identity of the offender. As the defendant himself has pointed out, the lineup testimony was merely corroborative of the in-court identification, which identification we find to have been positive and of independent origin. It is rooted in the victim's having had an opportunity to view the offender at close range and under favorable lighting conditions for a period of approximately three minutes. This evidence is heavily buttressed by the testimony establishing that the victim made a positive identification by selecting defendant's photograph from a group of approximately 600. See *People v. Mays*, 1971, 48 Ill.2d 164, 269 N.E.2d 281 and *People v. Fox*, 1971, 48 Ill.2d 239, 269 N.E.2d 720.

It is next contended that defendant was denied a fair trial when the jury was left uninstructed as to his theory of the case. Specifically, defendant urges that reversible error occurred when the trial court refused to give his tendered instruction on alibi. The instruction of juries in criminal cases is governed by Supreme Court Rule 451 (Ill. Rev. Stat. 1969, ch.110A, par.451) which provides that I.P.I. instructions shall be given and further establishes standards to be followed by the trial court in giving instructions not covered by I.P.I. but which, in the discretion of the court, are necessary. I.P.I. 24.05 contains the recommendation that no instruction be given as to alibi as it is not an affirmative defense and it is deemed preferential that instructions not comment on particular types of evidence. In *People v. Poe*, 1971, 48 Ill.2d 506, 272 N.E.2d 28, our Supreme





Court, after noting the I.P.I. recommendation, held that the refusal of the trial court to give an instruction on the subject of alibi was not error.

In arguing that he was not proven guilty beyond a reasonable doubt, defendant attempts to discredit the testimony of Mrs. Dalsiel by pointing out that she did not detail the height of the offender when questioned by investigating police officers and that she could not describe the clothing worn by defendant at the lineup. He asserts that these factors indicate her lack of ability to observe and recall, thus negating the possibility that her in-court identification testimony was positive. He concludes that in the light of his alibi testimony, which was corroborated by seven witnesses, her identification was not sufficient to establish his guilt by the requisite standard. Here, as in most cases where an alibi defense is interposed, the trier of fact must resolve the differences between conflicting testimony by determining the credibility of the witnesses. In doing so they may consider not only those factors which defendant alleges discredits the testimony of the complaining witness, but also such factors as the relationship between defendant and those who testified on his behalf. The jury was under no obligation to believe certain witnesses and we see nothing in the record before us which would justify our disregard of their determination as to credibility.

Finally, defendant argues that the trial court abused its discretion in refusing to admit him to probation. While it is true that defendant's prior record was minimal, we are not prepared to hold that the refusal of the trial court to admit to probation one who stands convicted of a forcible felony constitutes an abuse of discretion. The judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J. and BURKE, J., concur.







Loan 6-11-69

55846

I.A.<sup>3</sup> 112

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
Plaintiff-Appellee,	)	
	)	CIRCUIT COURT,
vs.	)	
	)	COOK COUNTY.
HENRY L. WINTERS,	)	
Defendant-Appellant.)	)	HON. SAUL A. EPTON,
		Presiding.

ABST.

MR. JUSTICE BURKE delivered the opinion of the court:

Defendant was found guilty at a jury trial of the crime of involuntary manslaughter and was sentenced to a term of five years to ten years in the penitentiary. He appeals.

On the evening of November 5, 1969 the defendant was standing among a group of men at the corner of Lexington Street and Kedzie Avenue in Chicago; the group included Herbert McCaskill, James Taylor and Charles Stokes. Taylor entered a nearby liquor store, and when he emerged he was approached by McCaskill; the latter man, who was intoxicated, asked Taylor for money. An argument ensued between McCaskill and Taylor, and the two men proceeded to walk westerly along Lexington Street.

When they reached the alley west of Kedzie Avenue, Taylor and McCaskill engaged in a physical struggle, whereupon the defendant left the corner and walked to the alley where the struggle was taking place. Defendant removed a gun from his clothing and held it in the air where the other two men could see the weapon. Taylor and McCaskill continued to struggle and defendant placed the weapon in Taylor's side, stating, "Be cool." When the struggle still continued, defendant pushed the weapon into Taylor's side with greater force and the gun discharged, causing Taylor's death. Defendant thereupon fled the scene.

Mr. Morris Aronosky testified for the People that he resided at



3214 West Lexington Street on November 5, 1969 and that he was awakened by a noise outside his window at about 10:00 or 10:30 P.M. The witness testified that he looked through the window and observed a man lying on the ground and two men standing nearby. He identified one of the two standing men as a person named "Fats" whom the witness had seen in the neighborhood prior to the night in question, but he was unable to identify the second standing man. It appears from the record that the person identified by the witness as "Fats" was Herbert McCaskill.

Mamie Kirkwood testified for the People that she was in her home at 3218 West Lexington Street on the night in question and that she observed three men near the alley west of Kedzie Avenue. She testified that she recognized one of the men as "Fats" and another as "Smokey," whom the witness identified as the defendant.

City of Chicago Detectives Richard Sandberg and James Griffin were assigned to investigate reports by several citizens of gunshots having been heard in the vicinity of Lexington Street and Kedzie Avenue, at about 10:30 P.M. on the night in question. The officers interviewed several persons at the scene of the shooting and received information that one of the men at the scene at the time of the shooting was known as "Fats" and that "Fats" worked at a nearby gasoline filling station with a person called "Little Charles." The officers thereafter learned the residence address of Charles Stokes ("Little Charles") from police headquarters.

The officers attempted to locate Stokes at the address supplied by police headquarters, but to no avail. After additional efforts by the officers, Stokes was located at another address, hiding under a bed. Stokes informed the officers that he had nothing to do with the shooting, but that he would take the officers to



McCaskill's residence. Under Stokes' direction, the officers went to four or five residences in search of McCaskill, but he was not located.

After having made the search for McCaskill, the officers and Stokes were seated in the police vehicle engaged in conversation when the defendant and another person walked past the vehicle. Stokes informed the officers that he (Stokes) had witnessed the shooting and that the defendant, who had just passed the police vehicle, had done the shooting. Defendant was then placed under arrest and was transported to police headquarters.

Defendant at first denied any knowledge of the shooting during the questioning at police headquarters, but he later made an oral statement to the officers which was thereafter reduced to writing. By pre-trial motion, defendant sought to have the statements made by him excluded from the evidence, and after extensive hearings, the motion was denied. Similar contentions raised during trial and in defendant's post-trial motion were also rejected by the trial court.

Defendant testified in his own behalf at trial. He related an account of the circumstances leading up to the shooting in accord with those set out above, and admitted that he shot James Taylor. When defense counsel attempted on direct examination to elicit defendant's state of mind at the time of the shooting, an objection interposed by the prosecution was sustained by the court. Defendant later testified that he did not intend to shoot Taylor, but that he was merely attempting to break up the fight and that in the process the weapon accidentally discharged.

Defendant initially contends that the trial court committed reversible error in admitting the confession made by him into evidence,





as the product of an illegal arrest. He argues that his arrest resulted from information supplied by Charles Stokes, who was not of proven past reliability and whose information was not independently corroborated, so as to have afforded the officers reasonable grounds upon which to predicate the arrest.

The requirement of prior reliability which must be met when police act upon a "tip" from a professional informer, does not obtain where the information leading to an arrest without a warrant is supplied by ordinary citizens. See *People v. Thompson*, 3 Ill.App. 3d 470, 278 N.E.2d 462; *People v. Glenn*, 35 Ill.2d 483, 221 N.E.2d 241; *In re Boykin*, 39 Ill.2d 617, 237 N.E.2d 460.

It was through several local-citizen eyewitnesses that Detectives Sandberg and Griffin learned that Herbert McCaskill was one of the men observed at the scene of the shooting, and that he also worked with a man named Charles Stokes. After locating Stokes, who, the record shows, lived in a building frequented by "winos," the officers were told by Stokes that he knew nothing of the incident but that he would lead the officers to McCaskill. After failing to locate McCaskill, and during a conversation between the officers and Stokes, Stokes pointed out the defendant as the person who committed the crime.

There is no evidence in the record from which it could be inferred that Stokes was a "special employee" employed by the police, or that he was a professional informer. On the contrary, Stokes was an ordinary citizen giving information to the police of what he had observed during the commission of a crime. The fact that Detective Griffin stated that Stokes had been placed under arrest when he was found by the officers hiding under the bed does not impair Stokes' standing as a citizen informer in this case. See *People v. Carter*,



116 Ill.App.2d 62, 253 N.E.2d 490; People v. Roberta, 352 Ill. 189, 185 N.E. 253. The police officers had reasonable grounds upon which to effect the arrest of the defendant without a warrant, and the admission into evidence of the confession made by the defendant subsequent to that arrest was consequently not improper by reason of an illegal arrest.

The cases cited by defendant in support of his contention in this regard are inapplicable to the circumstances of the case at bar: Morales v. New York, 396 U.S. 102; Wong Sun v. United States, 371 U.S. 471; People v. Durr, 28 Ill.2d 308, 192 N.E.2d 379; People v. Miller, 34 Ill.2d 527, 216 N.E.2d 793.

Defendant next contends that it was reversible error for the trial court to sustain the objection to the question relating to his intent at the time of the shooting.

While it is true that this was a proper subject of direct examination by defense counsel and that the defendant should have been permitted to answer the question (People v. Biella, 374 Ill. 87, 28 N.E.2d 111), this contention is obviated by the fact that in his later testimony, both on direct examination and on cross-examination, the defendant was asked questions and responded, concerning his state of mind at the time of the shooting and whether he intended to discharge the weapon. The jury was in fact afforded the opportunity to hear from the defendant relative to his intent at the time of the shooting.

The final contention raised by the defendant is that the trial court improperly sentenced him to an excessive minimum term of years in the penitentiary, which was in part based upon the court's consideration of matters improperly brought out during the hearing in aggravation and mitigation.

It appears from the record that during the hearing in aggravation and mitigation the assistant state's attorney commented to the



trial court that the defendant "had a bond forfeiture and a warrant (issued by the trial judge) for UUW (unlawful use of weapons) and a petty theft and resisting arrest. . . there is no disposition that appears on this record, these may still be outstanding, Judge, as far as I know." (sic.) No evidence of any encounters with the law by the defendant which resulted in convictions was presented to the court, other than a single conviction for disorderly conduct for which defendant received a fine. The trial court thereafter commented that he could not overlook the fact that the defendant carried a loaded weapon, and that the defendant had appeared before the judge on an unlawful use of weapons charge in the past.

Arrests and other encounters with the law which have not resulted in convictions are inadmissible at a hearing in aggravation and mitigation in arriving at the punishment for the crime charged. See *People v. Jackson*, 95 Ill.App.2d 193, 200, 238 N.E.2d 196, 199. It is clear that the trial court improperly relied upon the prior arrest record of the defendant in arriving at the sentence imposed. The sentence is accordingly reduced to a term of not less than three years nor more than ten years in the penitentiary.

For these reasons the judgment is modified and as modified the judgment is affirmed.

JUDGMENT AFFIRMED AS MODIFIED.

GOLDBERG, P.J., and LYONS, J., concur.



6 I.A.<sup>3</sup> 165

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable MEL ABRAHAMSON, Justice  
Honorable WILLIAM L. GUILD, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

June 28, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:





IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	Appeal from the Circuit
	)	Court of the Eighteenth
	)	Judicial Circuit, DuPage
DAVID C. AUGUSTINE,	)	County, Illinois.'
	)	
Defendant-Appellant.	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

On March 4, 1971, the defendant, David C. Augustine, was indicted, together with a co-defendant, by a grand jury of DuPage County for the offenses of burglary and theft. Augustine was found to be indigent and the public defender was appointed to represent him. A plea of not guilty was entered to both counts and, after pre-trial discovery had been completed, the matter was set for trial.

On April 5, the defendant appeared in court with the deputy public defender and asked leave to withdraw his plea of not guilty to the burglary charge based on a plea negotiation with the prosecution. The court was advised that the State would not prosecute



Augustine on the charge of theft or under another indictment in which he was charged with the offense of possession of burglary tools and would recommend that he be sentenced to a term of 1-1/2 to 5 years in the penitentiary. The court then addressed Augustine and advised him of his right to remain silent, his right to a trial by jury and the maximum and minimum sentences prescribed for the crime of burglary. The plea of guilty was then accepted, the other charges were dismissed and the defendant sentenced in accordance with the plea agreement.

On April 30, the public defender was again appointed, this time to assist Augustine in his prosecution of an appeal from the judgment of conviction. On March 15, 1972, the public defender filed a petition to withdraw as counsel on the grounds that the appeal was wholly frivolous and without merit. A copy of that petition and supporting brief was mailed to the defendant on March 14.

We have examined the record in this case with care and are in agreement with the public defender that there is no merit in the appeal. The trial court followed the standards set forth in Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A, sec. 402) and only accepted the plea of guilty after he had determined that it was voluntarily and understandingly made. Although the court did not specifically mention the right of the defendant to a trial by the court, if a jury trial was waived, we have recently held that such an admonition is not necessary if it appears



that he was otherwise properly advised. People v. Charles,  
2 Ill. App. 3d. 452, 277 N.E. 2d. 348, 350.

We therefore conclude that the motion of the public defender  
should be allowed and the judgment below affirmed.

LEAVE TO WITHDRAW AS COUNSEL GRANTED AND JUDGMENT AFFIRMED.

SEIDENFELD, P. J., and GUILD, J., Concur.





6 I.A.<sup>3</sup> 187  
UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable MEL ABRAHAMSON, Justice  
Honorable WILLIAM L. GUILD, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On  
June 28, 1972 the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

HOWARD K. KELLETT, Clerk  
of the Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
v. ) Appeal from the Circuit Court  
 ) of the 18th Judicial Circuit,  
WALTER F. KRAMER, ) DuPage County, Illinois.  
 )  
Defendant-Appellant. )

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a conviction in a jury trial of driving under the influence of alcohol, improper lane usage, and resisting arrest. The trial judge fined the defendant \$50 and costs for resisting arrest, \$150 and costs for driving under the influence, and imposed no fine or costs for improper lane usage upon his ruling that this charge merged with the driving under the influence charge.

Defendant contends that (1) the testimony as to resisting arrest and driving under the influence of alcohol is so unsatisfactory as to raise a reasonable doubt concerning defendant's guilt, and (2) the trial court erred in not having provided the defense an adequate opportunity to use copies of police reports during cross-examination of both prosecution witnesses.

A careful review of the record reveals ample evidence to justify the jury's guilty verdict as to all charges. Therefore, no purpose would be served in discussing it in detail.

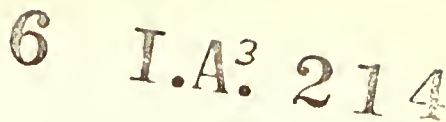


The trial court permitted defendant's counsel to read in chambers the Alcohol Influence Report prepared by Sergeant Gogliotti, and defense counsel cross-examined the sergeant concerning it. Defendant's counsel was also presented with an arrest report prepared by Officer Hess, and cross-examined him concerning that report. The record does not show that defendant's access to either of these reports was unduly limited. People v. Williams, 75 Ill. App. 2d 50, 58. The judgment of the circuit court of DuPage County is therefore affirmed.

JUDGMENT AFFIRMED.

SEIDENFELD, P.J. and GUILD, J., concur.





ROBERT W. WALKER.

APPEAL FROM THE  
CIRCUIT COURT OF  
COOK COUNTY.

vs.

HONORABLE  
ROBERT L. HUNTER,  
PRESIDING.

Defendant-Appellee.

# ABST.

We dismiss the appeal.

It must be noted, however, that there was some evidence present to suggest that plaintiff is being denied his right to visitation of his children. We would contemplate that the Circuit Court will hold a hearing with all due expediency to determine if any person is interfering with that right of visitation, and furthermore, to insure to the best of its ability that father and





children enjoy the intercourse contemplated in the Decree of Divorce.

Appeal dismissed.

DEMPSEY and McNAMARA, JJ., concur.



56210



6 I.A.<sup>3</sup> 217

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
Plaintiff-Appellee,	)	
	)	CIRCUIT COURT
v.	)	
	)	COOK COUNTY.
JAMES REED,	)	
Defendant-Appellant.)	)	Hon. Louis B. Garippo,
		Presiding.

ABST.

MR. JUSTICE BURKE delivered the opinion of the court:

Defendant was found guilty at a bench trial of the crime of burglary and was sentenced to a term of one year to two years in the penitentiary. He appeals.

The Public Defender of Cook County was appointed counsel for defendant on appeal and has filed in this Court a petition for leave to withdraw as appellate counsel. Pursuant to the case of Anders v. California, 386 U.S. 738, the Public Defender has also filed a brief in support of his petition, alleging the appeal to be frivolous and without merit.

This Court thereafter notified the defendant of the pending petition, granting him leave to file points in support of the appeal and advising him that if in fact found by this Court to be frivolous, the petition would be allowed and the judgment affirmed without further appointment of counsel. Defendant has not responded.

The petition and brief of the Public Defender allege that the sole question which could be raised on appeal relates to the question of whether defendant was proven guilty beyond a reasonable doubt. Examination of the entire record by this Court, as required by the Anders decision, reveals that no issue could be raised on appeal other than that alluded to by the Public Defender. Examination of the record further reveals that a contention raised on



appeal as to whether defendant was proven guilty beyond a reasonable doubt would be without merit.

The evidence adduced at trial, composing thirty-two pages of transcript of proceedings, is as follows:

Mrs. Gladys James testified that she left her apartment at about 5:00 P.M. on February 9, 1971, and returned at about 7:30 that evening to find a rear window broken and the apartment in disarray. She testified that a wristwatch and some coins which had been on her bedroom dresser were missing. The witness further testified that she did not give defendant permission to enter her apartment on the evening in question.

Richard James, son of the complaining witness, testified that he arrived at the apartment about 7:00 P.M. that day, that he found a rear window to the apartment had been broken, and that he came upon the defendant as the defendant was exiting from the witness' mother's bedroom. The witness testified that he subdued the defendant by striking him in the head with a radio, and that the police were then called.

Chicago Police Officer Rocco Colucci testified that he responded to the call from the James apartment, and that upon entering the apartment he observed the defendant and Richard James near a bedroom. He testified that he placed the defendant under arrest and that a weapons search of the defendant's person revealed the wristwatch taken from the bedroom dresser in one of defendant's pockets.

The defendant testified in his own behalf and stated that he had come to the apartment building in which the James apartment was located to visit a relative who also lived in the building.





He testified that outside the basement of the building he was stopped by Richard James and another man, and was accused by James of burglarizing the James apartment. Defendant testified that, at knife point, he was forced into the James apartment and that the police were called.

Defendant was then found guilty of burglary and, after a hearing in aggravation and mitigation which revealed a past record of four criminal convictions, the People recommended that defendant be sentenced to a term of two years to four years in the penitentiary. The trial court sentenced defendant to a term of one year to two years in the penitentiary.

The sole issue which could be raised on this appeal relates to the credibility of the witnesses. The People's witnesses placed the defendant at the scene of the burglary, it was necessary that defendant be subdued when found exiting from Mrs. James' bedroom, and an item taken during the theft was found in defendant's pocket. Defendant, on the other hand, denied committing the burglary, and maintained that the complaining witness' son accused the defendant of committing the burglary when the two confronted each other outside the apartment building and that the son forced the defendant into the apartment at knife point.

The question of the credibility of the witnesses is a matter for the determination by the trier of fact, and such determination will not be disturbed on review unless the evidence is palpably contrary to the finding or verdict, or is so unreasonable, improbable or unsatisfactory as to create a reasonable doubt as to the guilt of the accused. *People v. Owens*, 73 Ill.App.2d 108, 219 N.E.2d 733.



A review of the instant record reveals that the evidence was neither contrary to the finding of the court, nor was it so unreasonable, improbable or unsatisfactory as to create a reasonable doubt as to defendant's guilt.

From all the circumstances disclosed by the record we conclude that the appeal is frivolous and wholly without merit. The Public Defender of Cook County is accordingly granted leave to withdraw as counsel for the defendant on appeal. The judgment is affirmed.

PETITION ALLOWED.  
JUDGMENT AFFIRMED.

GOLDBERG, P.J., and LYONS, J., concur.



57104

PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM  
 Plaintiff-Appellee, )  
 ) CIRCUIT COURT,  
 vs. )  
 ) COOK COUNTY.  
 RAY A. MARSHALL, )  
 Defendant-Appellant. ) HON. ROBERT J. COLLINS,  
 Presiding.



ABST.

MR. JUSTICE BURKE delivered the opinion of the court:

Defendant entered pleas of guilty to two indictments charging him with the offenses of theft and robbery. He was found guilty as charged in the indictments and was placed on probation for a period of five years, the first three months of which were to be served in the county jail.

Eighteen months later a rule was issued to show cause why defendant's probation should not be revoked, on the grounds that defendant had committed and been convicted of the offenses of attempt theft and resisting arrest within the period of probation. Defendant was represented by the Public Defender of Cook County at the hearing on the rule and admitted at the hearing that he was the same person who was convicted of the aforementioned offenses. Defendant's probation was revoked, and he was sentenced to a term of one year to three years in the penitentiary on each offense, the sentences to run concurrently.

The Public Defender of Cook County was appointed counsel for the defendant on appeal and has filed in this Court a petition for leave to withdraw as appellate counsel. Pursuant to the requirements set out in the case of *Anders v. California*, 386 U.S. 738, the Public Defender also filed a brief in support of his petition, alleging that the appeal is frivolous and without merit. This Court thereafter notified the defendant of the pending petition and granted him leave to file points in support of the appeal. Defendant



has not responded.

The petition and brief of the Public Defender allege that the sole question which could be raised on appeal relates to the procedural propriety of the hearing on the rule to show cause.

Defendant, who was represented by counsel at the hearing, was apprised by the trial court that he was accused of violating his probation. He admitted to the court that he was the same person who had theretofore been convicted of the attempt theft and resisting arrest offenses, committed during the period of probation. A review of the proceedings at the hearing on the rule to show cause reveals that the procedure followed conformed substantially to that required by statute and case law of this state governing the matter. (Ill. Rev. Stat.1971, Chap.38, Para.117-3; People v. Price, 24 Ill. App.2d 364, 164 N.E.2d 528; People v. Dwyer, 57 Ill.App.2d 343, 206 N.E.2d 113.)

The sole question which might be raised as error committed below, found by this Court upon examination of the entire record in this case as required by the Anders decision, is that the court sentenced the defendant to terms of one to three years, whereas the assistant state's attorney recommended terms of one to two years. It has been consistently held that the trial judge is not bound to follow the recommendations of the prosecuting attorney in sentencing, but may in fact sentence a defendant convicted of a crime to a longer term than that recommended by the People. See People v. Greer, \_\_\_\_Ill.App.2d\_\_\_\_, 270 N.E.2d 849; People v. Danno, \_\_\_\_Ill. App.2d\_\_\_\_, 270 N.E.2d 42. Further, the sentence imposed by the trial court cannot be said to be excessive in light of the circumstances attending the robbery and the theft of which the defendant was convicted.





From all the circumstances disclosed by the record, we conclude that the appeal is frivolous and wholly without merit. The Public Defender of Cook County is granted leave to withdraw as counsel for defendant on appeal. The judgments of conviction are affirmed.

PETITION ALLOWED.  
JUDGMENTS AFFIRMED.

GOLDBERG, P.J., and LYONS, J., concur.



56641



6 I.A.<sup>3</sup> 286

PEOPLE OF THE STATE OF ILLINOIS, )

Respondent-Appellee, )

vs. )

JAMES WEAVER, )

Petitioner-Appellant. )

APPEAL FROM THE  
CIRCUIT COURT  
OF COOK COUNTY.

HONORABLE  
ROBERT J. COLLINS,  
PRESIDING.

ABST.

MR. JUSTICE LYONS delivered the opinion of the court:

This is an appeal from a dismissal of defendant's petition for post-conviction relief. Ill. Rev. Stat. 1969, ch. 38, par. 122-1 et seq. Defendant presents three contentions:

- (1) That he was inadequately represented at the post-trial hearing;
- (2) That certain physical evidence, allegedly the fruit of an unreasonable and illegal search, was improperly admitted into evidence at trial;
- (3) That the court erred by failing to conduct a preliminary hearing on the admissibility of certain physical evidence.

Defendant was convicted of attempt robbery in 1969 and was sentenced to a term of not less than 13 years nor more than 14 years in the Illinois State Penitentiary. On direct appeal of the conviction to this court he contended that he was denied equal protection of the law by the trial court's refusal to provide him a free preliminary hearing transcript, that the State's final argument was so prejudicial as to constitute reversible error and that his sentence was inconsistent with State law requiring indeterminate sentences. This court rejected those contentions and affirmed the conviction. See *People v. Weaver*, No. 55077 (Ill. App., filed May 5, 1972).

Defendant filed a pro se petition for post-conviction relief on April 7, 1970, alleging therein:

1. That defendant was denied a preliminary hearing on his motion to suppress all physical evidence. In violation of the IV amendment to the constitution of the United States, and Chapter 38, section 114-12 (b).



2. That the defendant was compelled to be a witness against himself in violation of V amendment to the constitution of the United States. In that evidence illegally seized, from the defendant, and seized in another place from the arrest, remote in time, was used as evidence against the defendant over his objection.

The Public Defender of Cook County was appointed to represent the defendant-petitioner on the same date. Sometime thereafter the State filed a motion to dismiss the petition and the matter was set for hearing. At the hearing petitioner's contentions were considered and found to be without merit. The State's motion to dismiss was subsequently granted. This appeal followed.

Defendant initially contends that he was inadequately represented in the post-conviction proceeding. He presents a twofold argument in support of this contention: first, he argues that his counsel erred by failing to amend the pro se petition which was filed; second, he argues that his counsel failed to effectively advocate his position. We find no merit in this contention.

The duties of counsel appointed to represent a petitioner seeking a post-conviction hearing have recently been incorporated into Supreme Court Rule 651(c) [Ill. Rev. Stat. 1971, ch. 110A, par. 651(c)] which provides:

\* \* \*

The record filed in [the appellate] court shall contain a showing \* \* \* that the attorney has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional right, has examined the record of the proceedings at the trial, and has made any amendments to the petition filed pro se that are necessary for an adequate presentation of petitioner's contentions.

The record in the case at bar reveals that this Rule has been complied with. At the hearing, petitioner's counsel stated that he had personally interviewed petitioner at the penitentiary on three separate occasions "to discuss the case in detail with him," had completed a detailed questionnaire based on information supplied by petitioner and had read the full transcript of the





trial. He made no amendments to the petition but, as appears from the record, none were necessary. The allegations of the pro se petition were given liberal consideration by the court and neither the court nor counsel had difficulty in understanding or discussing petitioner's contentions. Counsel presented all facets of the contentions in lawyerlike fashion and, in apparent recognition of his duty to the court as well as to his client, conceded only those which were clearly unfounded. Under these circumstances, we find no indication that counsel's representation was inadequate or incompetent. See *People v. Westbrook*, No. 56539 (Ill. App., filed May 9, 1972).

Defendant's second contention concerns the admissibility of certain physical evidence, i.e., a shotgun shell, which was introduced into evidence at trial. Defendant argues that the shotgun shell was seized in an illegal search and, therefore, should not have been admitted into evidence. The facts of this case, however, do not support defendant's contention. The facts disclose that defendant, armed with a shotgun, and a confederate entered Farmer Brown's Chicken Shack at 1271 N. Clybourn Avenue, Chicago, on October 6, 1968, and announced a hold-up. Resistance was offered by the occupants of the store and, during an exchange of gunfire, defendant was shot in the neck and fell to the floor. The police were called and, when they arrived, observed the seriously wounded defendant lying on the floor and were informed about the details of the incident. Defendant's shotgun was seized and his wound examined. An officer tried to communicate with defendant but received no response. The officer then searched defendant's pockets. During the search, a wallet containing identification papers and an unspent shotgun shell were discovered. It was the introduction into evidence of this unspent shotgun shell about which defendant now complains.

The trial judge ruled that the search of defendant's person



was incident to a lawful arrest, based on probable cause, and thus denied defendant's motion to suppress the shotgun shell. We believe that the ruling was proper and may be sustained on a number of grounds, i.e., that the search was incident to lawful arrest, Ill. Rev. Stat. 1969, ch. 38, pars. 107-2(c), 108-1; that it was substantially contemporaneous with an arrest, *People v. Jeffries*, 1964, 31 Ill.2d 597, 203 N.E.2d 396; or that it was necessary to determine the identity of the wounded defendant, *People v. Smith*, 1970, 47 Ill.2d 161, 265 N.E.2d 139. Moreover, the shotgun shell was cumulative evidence only and its introduction could not possibly have prejudiced the defendant to any substantial degree.

Defendant finally contends that the court erred by failing to conduct a pre-trial hearing on the admissibility of the shotgun shell. The record discloses, however, that the court was not requested by the defense to rule on the admissibility until after all State witnesses had testified. Then, when the defense did ask for a ruling, the court conducted a hearing outside the jury's presence. Such procedure was entirely proper under the circumstances indicated.

The order of the trial court dismissing defendant's petition is therefore affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J. and BURKE, J., concur.



The logo of the Chicago Bar Association is an oval stamp. The words "CHICAGO BAR" are curved along the top inner edge, and "ASSOCIATION" is curved along the bottom inner edge.

6. I.A.<sup>3</sup> 306

APPEAL FROM THE  
CIRCUIT COURT OF  
COOK COUNTY.

HONORABLE  
GEORGE A. HIGGINS,  
PRESIDING.

# ABST.

Defendants-Appellants.

Upon going to the plaintiff hospital in May of 1965, Mrs. Sandoval was interviewed by a lady identified as a Mrs. Heller who was associated with the plaintiff's charity clinic. The interview related to the Sandoval's financial situation, and at its conclusion Mrs. Sandoval was told that there would be no charge for any of the treatments received with the exception that payment would be required for casts and x-rays. Mrs. Sandoval informed the plaintiff that she and her husband were covered by a medical insurance policy. Subsequently, the defendants' child underwent extensive out-patient treatment until January, 1966, when he was





admitted to the hospital for the first of three operations. Prior to admission Mrs. Sandoval was again interviewed by Mrs. Heller relative to the family financial situation. She was told that there would be no charge for the operation with the exception of a charity room rate of \$5 per day. Mrs. Sandoval again mentioned the medical insurance policy which the family had.

After the operation of January, 1966, the Sandovals discontinued their medical insurance. Since the plaintiff had made no claim on them for any of the previous treatment, they regarded it as an unnecessary expense.

Prior to the second operation in August, 1968, which operation is the basis for the instant action, Mrs. Sandoval testified that she was again interviewed by Mrs. Heller. The format of the interview was the same as previously, and again Mrs. Sandoval was informed there would be no charge for the operation. This interview procedure was again carried out prior to the third and last operation in June, 1969, with the same results as the previous two interviews.

Subsequent to the third operation, in August of 1969, the defendants received two bills from the plaintiff within days of each other. One bill is the one in question here demanding \$2,230.10 allegedly as payment for the second operation. The second bill was \$125, allegedly for costs in connection with the third operation. Defendants paid the second bill of \$125. Some eight months after its receipt, suit was instituted on the bill for \$2,230.10.

Raul Sandoval's testimony corroborated his wife's with regard to the circumstances under which his son was taken to the plaintiff hospital. In addition he testified that he didn't expect to pay when he took the boy to the plaintiff hospital and that had he been charged, he would have been unable to pay. He corroborated his wife's testimony with regard to the fact that no bills were received from plaintiff until after the third operation. In addition, he said that after these bills were received he had a phone conversation with an unidentified employee of the hospital





who allegedly told him that if he paid the \$125, he would not be required to pay anything more.

The plaintiff's only witness was an accounting clerk employed by plaintiff. She testified on direct examination that the defendants' bill from the August, 1968, hospitalization came to her attention and was "charged in the ordinary way." She testified that charitable allowances were allegedly arranged by applying through the clinic associated with the plaintiff hospital whereupon after an interview by a social worker a charitable pay rate based on the particular income of the applicant would be established. She testified that prior to the hospitalization of August, 1968, the defendants were requested to come in for an interview but never did so. It was unclear as to who requested this interview, the accounting department of plaintiff or its charity clinic.

On cross-examination the witness testified that she had worked exclusively in the plaintiff's business office and never worked as a social worker or admitting clerk and that she never interviewed the defendants prior to or during 1968. Further, she testified that she had no personal knowledge of the operations of that department of plaintiff hospital which requested financial information from charitable applicants. She said that all of plaintiff's statements regarding defendants carried the same account number. Finally, she testified that she did interview Mr. Sandoval in 1970 and that from her interview she would say "he was able to pay something on the bill."

The plaintiff also called both defendants as adverse witnesses under the provisions of Section 60 of the Civil Practice Act, and both defendants testified that they did not expressly request a "charitable allowance" for the hospitalization in issue here.

On appeal the defendants raise the issues that the evidence adduced by the plaintiff failed to establish the requisite elements of an account stated as required by law. Further, the trial court erred in excluding as evidence the bill for \$125



presented by plaintiff to defendants in July, 1969, which defendants urge was a "final bill." Thus, they contend that if there was an account stated, it was one for \$125 which was settled when the defendants paid that amount. Finally, defendants raise the issue that the plaintiff is estopped to claim a payment for hospital services rendered in August, 1968. Specifically, defendants argue that the plaintiff, during all of the pre-August, 1968, interviews expressly represented that defendants' son would be provided with free hospital services. Free and complete hospital services were subsequently rendered. Defendants urge that this total course of conduct should operate to estop plaintiff from now claiming payment.

The plaintiff in its argument to the Court dismisses the notion that its claim is based upon the theory of an account stated. This is so even though the original complaints charged an "account stated as of September, 1968." Rather, plaintiff urges this is simply a case whereby defendants requested and received hospital services and are now liable therefor under the provisions of Ill. Rev. Stat. 1967, ch. 68, par. 15. The plaintiff admits that defendants were provided not only with essentially free operations for their son in June of 1966 and June of 1969, but free out-patient treatment during most of the time from May, 1965, up to a period subsequent to the third operation. However, plaintiff seeks to distinguish the first and third operations on the basis that prior to these operations a specific request for a "charitable allowance" was successfully made by defendants but that no such request was made prior to the August, 1969, operation.

In assessing the validity of the defendants' contention that the trial court erred in granting judgment to the plaintiff because plaintiff's evidence was insufficient to sustain relief on a theory of account stated or on any other theory, we are mindful of the oft-stated rule that a trial court's findings will not be disturbed unless against the manifest weight of the evidence.

Atkins v. County of Cook (1960), 18 Ill. 2d 287, 163 N.E. 2d 826. Nevertheless, it is the duty of the reviewing court to carefully examine the record to determine whether the evidence justifies the



judgment; and if from a consideration of the whole record it appears that the evidence does not justify the judgment, it must be reversed. Friedman Electric Co. v. St. Clair County Housing Authority of the City of East St. Louis (1959), 23 Ill. App. 2d 16, 161 N.E. 2d 473.

A review of the record by this Court reveals that defendants, primarily Mrs. Sandoval, testified that prior to the hospitalization in issue here they were told by an authorized agent of plaintiff, whom Mrs. Sandoval identified, that there would be no charge for the operation. Mrs. Sandoval testified that this interview procedure was essentially the same as those occurring in 1966 and subsequently in 1969. Plaintiff does not question these later occurrences.

The testimony of Mr. Sandoval corroborated that of his wife in various respects particularly the undisputed fact that the bill for this second operation on their son was received in August, 1969, which was almost a year after the second operation and even subsequent to a third operation performed in June, 1969.

In support of its case, plaintiff called as a witness one of its accounting clerks who testified that the defendants were asked to come in to be interviewed in August, 1968, "for a rating" and never came. Presumably, the "rating" meant a charitable rating which plaintiff's witness herself testified was handled by the plaintiff's charity clinic. Nevertheless, on cross-examination the witness admitted that she herself never interviewed the defendants before or during 1968, nor did she have any personal knowledge of the operation or procedures of the charity clinic, since she worked exclusively in the business office. We think this impeaching testimony at very least cast serious question on the credibility of this witness particularly as regards the fact of whether or not the defendants were in fact interviewed at plaintiff's charity clinic in 1968 as they testified they were.

The only other testimony offered by plaintiff was that of the defendants themselves who plaintiff called as adverse witnesses. Each of the defendants testified that they did not specifically request a "charitable allowance" prior to the second







operation. The futility of this testimony seems obvious in view of defendants' uncontradicted testimony on direct examination that they never on any occasion specifically or in so many words requested a "charitable allowance." Rather, they simply went to the clinic as requested, were interviewed on all occasions by the same person, and on each of these occasions were told they would not be charged except for certain specified minor costs. The plaintiff itself admits that defendants' son was rendered free treatment in 1966 and 1969, and this admission was made in the face of defendants' testimony that they did not request a "charitable allowance" on these occasions.

After giving full consideration to all the evidence, we must conclude that the finding of the trial court was against the manifest weight of the evidence. Accordingly, we reverse and remand to the trial court with instructions to enter judgment for the defendants.

Judgment reversed and remanded.

DEMPSEY and McNAMARA, JJ., concur.



56186

CHARGE-IT DIVISION OF HARRIS BANK )  
AND TRUST CO., )  
Plaintiff-Appellee, )  
vs. )  
LEONA DAVIS CLARK, )  
Defendant-Appellant.)

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

HON. GEORGE A. HIGGIN,  
Presiding.



**ABST.**

MR. JUSTICE BURKE delivered the opinion of the court:

Appeal is taken from an order entered upon a petition filed pursuant to Section 72 of the Civil Practice Act, allowing petitioner's request for the vacation of an order dismissing a law suit for want of prosecution. (Ill.Rev.Stat.1971, Chap.110, Para.72.)

On October 1, 1968 petitioner filed an action in contract against respondent claiming an amount due petitioner in connection with a credit card allegedly issued to and used by respondent. On December 12, 1968 judgment by default was entered against respondent in the amount claimed in the complaint, and it appears that garnishment and wage deduction proceedings were filed several days later.

On January 10, 1969 respondent appeared by counsel and filed a motion to vacate the default judgment. On the same day respondent's counsel mailed to petitioner's counsel copies of the motion to vacate, his appearance, and a proposed answer to the complaint, together with a cover letter dated January 9, 1969, stating that the motion to vacate would be called up for hearing "in the near future."

On January 31, 1969 counsel for respondent mailed a notice of motion to petitioner's counsel, that on February 5, 1969 he would appear in court and be heard on the motion to vacate the judgment, "a copy of which [motion] was mailed to you on January 10, 1969." On



February 5, 1969 the December 12th judgment was vacated and the cause was set for trial on May 14, 1969. It does not appear that petitioner or its counsel was in attendance at the time the judgment was vacated.

It further appears from the record that on May 7, 1969, seven days before the date set for the trial of the matter, the secretary for respondent's counsel twice telephoned petitioner's counsel with respect to the forthcoming trial, and on each occasion was informed by the latter's secretary that he was not in the office. It also appears that on May 13, 1969, the day before the date set for trial, notice of the trial date appeared in the Chicago Daily Law Bulletin. On May 14, 1969 neither petitioner nor its counsel appeared at the hearing, and the contract action was dismissed for want of prosecution.

On September 15, 1970 petitioner filed a Citation to Discover Assets, in response to which counsel for the respondent directly advised petitioner by mail that the judgment upon which the citation proceeding was based had been vacated and that the contract action had been dismissed theretofore. On April 1, 1971 the instant petition was filed, alleging in substance that at no time did petitioner receive notice from anyone of the filing of the motion to vacate the default judgment or of the hearing on the motion. The petition further alleged that "any affidavits or statements or certifications made by the defendant or her attorney to the effect that your petitioner has been served with notice are false." Respondent filed an answer to the petition the same day, setting forth the several notices mailed and telephoned to petitioner's counsel and denying that petitioner had grounds for the relief requested.

A hearing was held on the petition and the answer thereto, at



which time petitioner presented no evidence other than the statements of counsel to the effect that no notice was received of the vacation of the default judgment or of the dismissal of the contract action. Sworn testimony was presented by respondent that the written notices were mailed to counsel for petitioner at his business address in properly stamped and addressed envelopes on the dates alleged in the answer. Also introduced into evidence were matters relating to the telephone calls made to the office of petitioner's counsel, and to the notice of the trial date which appeared in the Chicago Daily Law Bulletin. The trial court thereafter granted the relief requested in the Section 72 petition, vacating the dismissal of the contract action, and respondent appeals.

The record reveals that petitioner was not entitled to relief under Section 72 of the Civil Practice Act. Section 72 was not intended to relieve a litigant from the consequences of his own negligence or lack of diligence. *Till v. Kara*, 22 Ill.App.2d 502, 161 N.E.2d 363.

No explanation is advanced for petitioner's failure to respond to the notices mailed to it relative to the hearing on the motion to vacate the default judgment, nor for its failure to respond to counsel's telephone calls relative to the trial of the cause. It is clear that petitioner was not diligent in following the case and in protecting its interests. It is no answer to say that the written notices mailed to petitioner's counsel were not received by him, inasmuch as Supreme Court Rule 11 provides for service of such papers by the method of mailing. Ill.Rev.Stat.1971, Chap.110A, Para.11(b)(3). See also *Panion v. Checker Taxi Co.*, 53 Ill.App.2d 364, 202 N.E.2d 852; *Houston v. Churchill*, 100 Ill.App.2d 56, 241 N.E.2d 560; *Suarez v. Yellow Cab Co.*, 112 Ill.App.2d 390, 251 N.E.2d 340.

For these reasons the order is reversed.

ORDER REVERSED.





No. 55470

WILLIAM GEORGE,

Plaintiff,

vs.

BERNARD TOAL,

Defendant,

IN THE MATTER OF MILTON M. BLUMENTHAL,

Appellant.

APPEAL FROM THE  
CIRCUIT COURT OF  
COOK COUNTY.

ABST.

HONORABLE  
REGINALD J. HOLZER,  
PRESIDING.

MR. PRESIDING JUSTICE MCGLOON delivered the opinion of the court:

This is an appeal from a judgment of contempt entered against the appellant for an alleged direct criminal contempt of court during the course of trial in a personal injury action.

We reverse.

The appellant, Milton M. Blumenthal, was the attorney for the plaintiff in a personal injury action. The case had already been on trial for nine days. The plaintiff's brother, who was in military service, had been called as plaintiff's last witness. Appellant questioned the witness with regard to his military record and current duties which involved recruiting in the Chicago area. The witness was wearing a military uniform, and the appellant inquired as to whether the medals and ribbons thereon indicated he had served in Korea and Vietnam. At this point defense counsel objected and proposed to make a motion. The court excused the jury, and after chiding appellant for "grandstand play" listened to appellant's explanation of why he thought his inquiries of the witness were proper. Thereupon defense counsel moved to withdraw a witness and declare a mis-trial arguing that appellant had persisted in asking leading questions and that his conduct was contemptuous of the trial court's orders. After arguing that it was essential that the jury know the witness's background in order to determine his credibility, the following colloquy occurred:

THE COURT: Are you through?

MR. BLUMENTHAL: No, I am not through.



THE COURT: Well, finish, please.

MR. BLUMENTHAL: I'd like to complete my statement. Additionally, Your Honor, sitting here, presiding over this trial, should know if you don't know, that the obvious intent and deliberate calculated motive on the part of counsel in bringing out with great flourish on cross-examination in front of the jury what this man signed on selective service questionnaires was intended obviously, and you'd be naive not to realize or recognize this, but his obvious motive was only \*\*\*\* [Emphasis added]

MR. MILLER: May I \*\*\*

MR. BLUMENTHAL: May I complete my God damn statement?

THE COURT: You are in contempt of this Court.  
There will be a five minute recess.

Thereupon the trial judge examined the witness in his chambers as to who instructed him to wear his dress uniform. Subsequently, the trial judge declared a mis-trial, fined Mr. Blumenthal \$500 for contempt and ordered the fine paid by 9:00 a.m. the following morning.

The next day an emergency appeal bond was set by this Court, and Blumenthal pursued this appeal.

On appeal the appellant raises the issues that the appellant's conduct did not constitute a direct criminal contempt and further that his right to due process was denied during the contempt proceeding. We will treat only the first issue, since we deem it dispositive of this appeal.

Contempt of court has been defined as any act which is calculated to embarrass, hinder or obstruct a court in the administration of justice, or which is calculated to lessen its authority or dignity. People v. Carr (1971), 3 Ill. App. 3d 227, 278 N.E. 2d 839. A direct contempt is a contempt committed in the presence of the court while it is in session. A criminal contempt is conduct directed against the dignity and authority of the court or a judge acting judicially. People v. Gholson (1952), 412 Ill. 294, 106 N.E. 2d 333.

We recognize and agree with the principle that the contempt power is essential to an orderly and effective administration and



execution of justice. However, we think that under the facts and circumstances of the instant case the appellant's conduct did not constitute contempt. Admittedly, the appellant's vulgarity was improper, and he should be ashamed for having made it. Additionally, his suggestion that the trial court was naive was insolent and highly unbecoming an attorney. Nevertheless, we do not think these remarks were of such magnitude as to obstruct justice or lessen the authority or dignity of the court. Whether the trial judge was unnecessarily influenced by his irritation over the fact that he thought Blumenthal had proposed that the witness wear his military uniform, we cannot say for sure.

We think that trial courts must be constantly on guard against confusing their sensibilities with the obstruction of justice. The appellant has noted that the vulgarity was not addressed to the trial judge, that this was the ninth day of a hotly contested trial in which emotions were at a high pitch and that the remarks were made outside the presence of the jury. Further, this was the only time during the trial that appellant had made such intemperate remarks. None of these latter factors are in and of themselves a defense to contempt. However, we think they afford at least a partial glimpse of the situation at the time the remarks were made which should be considered in assessing the contemptuous effect of the remarks.

We wish to emphasize that we are not holding that any and all vulgar outbursts by an attorney will allow him to avoid being held in contempt. It is incumbent on a trial court to preserve dignity and decorum therein and to use its contempt power to do so. However, we think that under the particular facts of this case, that power was improperly used, and we reverse the judgment of contempt.

Judgment reversed.

DEMPSEY and McNAMARA, JJ., concur.





6 I.A.<sup>3</sup> 335

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	
v.	)	COURT OF COOK COUNTY.
	)	
FOSTER TAYLOR,	)	Hon. Louis B. Garippo,
	)	Presiding.
Defendant-Appellant.	)	

ABST.

MR. JUSTICE McNAMARA delivered the opinion of the court:

Defendant was charged with the murder of Joe Edwards. After a bench trial, he was found guilty of involuntary manslaughter and sentenced to a term of one to three years. On appeal defendant contends that he was not proved guilty of involuntary manslaughter beyond a reasonable doubt.

On January 31, 1970, defendant and deceased, both patrons in a restaurant-lounge, had a quarrel, after which defendant shot and killed the deceased. Willa Mae Rogers, a waitress at the lounge, testified for the State that after the initial argument defendant left the premises. When he returned, defendant told the deceased to leave. The deceased arose, and several shots were fired. Because her view was blocked, the witness did not see a gun in either party's hand.

Willie Williams, another patron, testified for the State that defendant came in the front door and asked the deceased to step outside. Two other customers asked the deceased to forget it, but defendant refused. As the deceased got up, defendant shot him. Williams further testified that a struggle ensued between the two men and several more shots were fired, but that deceased did not have a gun in his hand. Williams took the gun away from the defendant and struck him on the head with the gun. Williams testified that he previously had been convicted of burglary.

Bernice Mitchell, Williams' companion at the lounge, testified for the State and corroborated the testimony of Williams. She also stated that she did not see a gun in the deceased's hand.

Two witnesses testified in defendant's behalf at a pretrial bond hearing. By stipulation that testimony was made part of the trial record. Finnie Baggett, a Chicago Housing Authority police



man, testified that he, Joe Marshall and defendant were drinking at the lounge on the morning in question. Shortly after they arrived, the deceased, also a friend of Baggett's entered and started arguing with "Honey" Miller over the way that Miller had parked his car. Miller joined the witness and defendant, and the latter offered to buy Miller a drink. At this point, the deceased jumped up, pulled out a gun and asked defendant, "Do you want something from me?" The deceased stated that he was going to teach defendant a lesson. Baggett persuaded the deceased to put the gun away. After buying a pint of whiskey, Baggett left the lounge with defendant and Marshall. They went into the alley and had a few drinks.

Baggett returned to the restaurant, and defendant followed a second or two later. Baggett heard the deceased say something to defendant, and saw deceased shoot at defendant. The witness then saw that defendant had a gun and was shooting at the deceased. Baggett heard three or four more shots fired in the crowded lounge. Another man (Williams) entered, identified himself as a policeman and tried to break up the struggle. Williams took the gun away from defendant and struck him in the head.

Joe Marshall, the other defense witness, testified that after the original argument he accompanied Baggett and defendant outside the lounge for a few minutes. He further testified that, upon their return, the deceased jumped up and fired at defendant. When the first shot was fired, Marshall sought cover. The next thing he saw was defendant with blood running from his forehead. Marshall stated that he did not see defendant fire a gun, but admitted that he was not watching.

It was stipulated that the gun recovered by Williams from the defendant was the weapon which caused deceased's death and that it contained five spent cartridges. No weapon was found on the deceased. It was also stipulated that defendant received a gunshot wound in his hand and that the injury to his forehead required surgery.

In making his finding, the trial judge stated that he would have to find defendant guilty of murder if he definitely believed



the testimony of the State's witnesses. Instead, the court found defendant guilty of involuntary manslaughter.

In arguing that he was not proved guilty beyond a reasonable doubt, defendant first contends that his conviction cannot stand where all the evidence showed that the killing was intentional. We note initially that the trial court, under the evidence adduced, was not compelled to find that all of defendant's conduct was intentional. More importantly, the gist of the offense of involuntary manslaughter is the reckless performance of an act likely to cause death. People v. Bolden, 103 Ill.App.2d 377, 243 N.E.2d 687. We believe that the evidence was sufficient to establish that the defendant acted recklessly rather than in self-defense.

The Criminal Code, Ill.Rev.Stat. 1971, ch.38, par.9-3(a), defines involuntary manslaughter as follows:

A person who kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly.

A person acts recklessly under the Code, Ill.Rev.Stat. 1971, ch.38, par.4-6, when he

consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow\*\*\*and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

Under the statute, involuntary manslaughter occurs where the acts are performed with a conscious awareness of the risk and a gross disregard thereof. People v. Guthrie, 123 Ill.App.2d 407, 258 N.E.2d 802.

In People v. Fox, 272 N.E.2d 765 (abstract decision), this court upheld a conviction for involuntary manslaughter on a murder indictment when it was challenged on the ground that the killing was intentional. In that case, defendant stabbed the victim while he was swinging his arm with a knife in his hand. Defendant, the sole witness for the defense, stated that he acted in self-defense because the deceased came towards him with a black object in his hand. The witnesses for the State all testified that the victim





was not armed. The court found that there was ample evidence to support the trial court's determination that in killing the deceased, the defendant acted recklessly rather than in self-defense.

Similarly, in the instant case, the trial court could properly determine that the actions of defendant were reckless. As noted in Fox, the trial court was not compelled to accept the evidence adduced by defendant that he acted in self-defense; the trial court heard all the evidence and could draw the necessary inferences therefrom.

In urging that the State did not prove beyond a reasonable doubt that the shooting was not performed in self-defense, defendant also maintains that his witnesses were more credible than the State's witnesses and that the trial court rejected the State's evidence. Defendant argues that his witnesses were more credible because Williams was a convicted felon and had a motive to perjure himself in that he could be liable for striking defendant with a gun.

Where the cause is tried without a jury, it is the province of the trial judge, who heard and saw the witnesses, to determine their credibility and to weigh their testimony, and a reviewing court should not substitute its judgment for that of the trial court where the evidence and the inferences therefrom are merely conflicting. People v. Wiggins, 12 Ill.2d 418, 147 N.E.2d 80. It is also for the trier of fact to settle any conflict in the evidence and determine from the facts and circumstances whether defendant acted in self-defense. People v. Green, 23 Ill.2d 584, 179 N.E.2d 644.

In the case at bar, the evidence was sufficient to support the trial court's determination that defendant acted recklessly rather than in self-defense. In making that determination, the trial judge was aware of Williams' prior criminal record. He was also aware that all the witnesses were agreed that Williams' role in the unfortunate incident was that of attempted peacemaker. As to defendant's contention that the trial court rejected the testimony of the State's witnesses, we note that the judge did not reject the State's evidence, but rather, determined accurately that if he accepted that evidence fully, he would have been compelled to find defendant guilty of murder.





For the foregoing reasons, the judgment of the circuit court is affirmed.

Judgment affirmed.

McGLOON, P.J., and DEMPSEY, J., concur.



## UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable MEL ABRAHAMSON, Justice  
Honorable WILLIAM L. GUILD, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On  
June 28, 1972 the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:









and confinement expenses incurred by the mother. On appeal, the defendant contends that there was no evidence to support that judgment since the testimony of Miss Abraham was "inherently contradictory and self serving" and the testimony of the only other witness to appear conclusively proved he could not be the father.

A paternity proceeding has the appearance of a criminal prosecution but is essentially in the nature of a civil action to compel the putative father to support his child. *People ex rel. Elkin v. Rimicci*, 97 Ill. App. 2d. 470 , 240 N.E. 2d. 195, 199. In a paternity case, the burden of proof is on the plaintiff and the charge must be supported by the preponderance of the evidence. *In re Blackwell v. Welti*, 46 Ill. App. 2d 453, 197 N.E. 2d. 126; *LaLacker v. Stuckey*, 40 Ill. App. 2d. 341, 344, 189 N.E. 2d. 676.

The relatrix testified that she met the defendant on the night of the Pecatonica Fair in August, 1969, and had intercourse with him on September 12, 1969. She further testified that she did not have intercourse with anyone else during the months of July, August, September or October of that year.

Dr. Roger Goodspeed, an obstetrician and gynecologist, testified that he first examined Miss Abraham on December 12, 1969 and determined that she was pregnant. She informed him on that date that her last menstrual period had been from September 7 through September 12, 1969. It was his opinion that it was unlikely that she could have become pregnant on September 12, the last day of the cycle, since the chances of conception at that time are no more



than 5%. He also testified that the gestation period was normal and that the baby was full term.

On rebuttal, the relatrix was not certain as to the exact date she ceased menstruating but stated that it was at least two days before she had intercourse with the defendant.

The defendant contends that the testimony of the plaintiff was evasive, self serving and tailored to meet the necessities of her suit. It was, of course, the function of the trial court, as the trier of fact, to consider the evidence and resolve any inconsistencies or contradictions. In re Blackwell v. Welti, *ibid*. Although there was some confusion as to the last day the relatrix menstruated, her testimony that she had intercourse with the defendant on September 12, and with no one else during the time conception had to take place, was uncontradicted. Certainly on that basis the conclusion of the trial court that the defendant was the father of the child is supported by the record. We therefore conclude that the judgment should be affirmed.

AFFIRMED.

SEIDENFELD, P.J., and GUILD, J., Concur.



State of Illinois )  
Appellate Court ) ss: .  
Second District )

ARST.

At a session of the Appellate Court, begun and held at  
Elgin, on the 6th day of December, in the year of our Lord  
one thousand nine hundred and seventy-one, within and for the  
Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Acting Presiding Justice  
Honorable MEL ABRAHAMSON, Justice  
Honorable THOMAS J. MORAN, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On  
July 18, 1972 the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:



NO. 71-231

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

HON. RO. E. KELLEY, Clerk  
Appellate Court, Second District

CITY OF PARK CITY, a municipal  
corporation of the State of Illinois,

Plaintiff-Appellee,

vs.

HY BROSTEN, d/b/a HY-WAY SALES,

Defendant-Appellant.

Appeal from the Circuit Court,  
Nineteenth Judicial circuit, Lake  
County, Illinois.

JUSTICE THOMAS J. MORAN DELIVERED THE OPINION OF THE COURT:

Defendant appeals from an order striking his petition to rescind an oral settlement agreement and an order based upon said agreement.

The defendant operates a junk yard on his premises in Park City, Illinois. Because of non-compliance with plaintiff's ordinance, a complaint for injunction was filed. The parties, during the defense portion of the trial and in the presence of the judge and the court reporter, dictated a settlement agreement into the record. In substance, the stipulated agreement provided that an injunction would issue restraining the defendant from operating his junk yard but that issuance of the injunction would be stayed for eighteen months.

Two days later, defendant filed a petition, supported by affidavit, to rescind and withdraw the agreement, alleging that he had entered into the stipulation believing that he could, in accordance with his earlier contemplation, relocate the business to his adjoining property located in the City of Waukegan; that several months earlier he had





engaged a construction company to draw up plans for such move. On the day of the agreement he learned, from a newspaper article, that the Lake County Forest Preserve District Board of Commissioners had adopted a "Green Belt" program and, upon inquiry, learned that his Waukegan property fell within the "Green Belt" and would be subject to sale or condemnation. Since such condemnation would bar the relocation he had contemplated, defendant asked that the agreement be rescinded due to a material mistake of fact and alleged that, if not rescinded, the agreement would force him out of business. Defendant pointed out that the agreement had not yet been reduced to a decree and that he was prepared to resume trial immediately.

At the time of the stipulation the contemplated move was never made known to the court or opposing counsel nor was it included as a contingency within the stipulated agreement.

In opposition, the plaintiff filed a motion to strike defendant's petition which, while not contradicting defendant's allegations, stated they were insufficient for rescission. After hearing arguments of counsel the trial judge allowed plaintiff's motion on the basis that defendant's petition "contains anticipatory matters and conclusions and conjecture and further that the matters contained therein cannot be taken as factual, but are assumptions." A decree granting the injunction based upon the agreement was then entered.

A stipulation will be upheld unless it is unreasonable, contrary to public morals or a result of fraud. The People v. Spring Lake District, 253 Ill. 479, 492 (1912), Filko v. Filko, 127 App. 2d 10, 25 (1970), In re Estate of Moss, 109 App. 2d 185 (1969) and Kazubowski v. Kazubowski, 93 App. 2d 126, 134 (1968) cert. den. 393 US 1117 (1969). See also, Jackson v. Ferolo, \_\_\_ Ill. App. 3d \_\_\_, 283 NE 2d 247 (1972). The defendant's petition and affidavit alleged none of these grounds. Instead, he relies exclusively upon Vece v. DeBiase, 46 App. 2d 248 (1964) wherein a litigant was allowed to withdraw from a settlement agreement because of a material mistake of fact. We distinguish that case from the present. There the parties entered into an out of court oral settlement contingent upon the Probate court's approval which was never obtained.

In the instant case we have an in court stipulated agreement without contingencies. Adoption of defendant's position would create a precedent allowing rescission of in-court



stipulations whenever one of the parties raised a contingency found only in his mind.

The orders appealed are affirmed.

JUDGMENT AFFIRMED.

Abrahamson and Guild, concur.



6

I.A. 526  
FILED  
JUL 20 1972

JUL 20 1972

Water T. Simmons  
CLERK DISTRICT OF ILLINOIS  
CLERK APPELLATE COURT

Appeal from the Circuit Court of  
St. Clair County.

ABST.

Honorable Harold O. Farmer,  
Judge Presiding.

PER CURIAM:

Appellant, Stanley Berryhill, then aged twenty-one, and a co-defendant guilty to burglary; both requested probation. The trial court entered judgment after investigation by the probation officer, and continued the cause for after probation hearings to be held May 9, 1968.

Prior to these scheduled probation hearings, Berryhill left the jurisdiction.

A bench warrant was issued May 10, 1968 and he was arrested on that warrant in East St. Louis in February 1970.

At the hearing prior to sentencing, appellant's testimony indicated that he had gone to Wisconsin to marry the mother of his then-newborn child. He had obtained employment as a tool and die worker in Wisconsin about May, 1968 and was still thus employed at the time of his arrest in February, 1970. His 1968 application for probation showed that he had previously been employed for several months as a mechanic in East St. Louis, and as a machine operator at McDonnell Aircraft. No probation report was received with the record.

Berryhill had one prior conviction for which he had been placed on three years probation. At the hearing, the State's Attorney questioned him as follows:

"Q. Do you know Robert Sayles?

A. Yes, Sir.

Q. Did you participate with him in a burglary of the Sear's Store in February, 1968?

A. No, Sir.





Q. Did you run with him?

A. No -- yes, we used to run together.

Q. Were you advised that there was an indictment pending against you in such a case?

A. No, not right then.

The conclusion of the hearing is shown in the record book as follows:

THE COURT: Stanley Berryhill, the Court has examined the report of the probation officer to which your application for probation was referred. The Court has also examined the copy of your record, and your previous offenses, and the disposition thereof. It is the opinion of the Court that you are not a fit subject for probation, and accordingly you -- your application for probation is denied, and you are sentenced to the Illinois State Penitentiary, to a term of not less than eight years, or more than fifteen years, there to remain until discharged according to law. \* \* \*

MR. RICE: Your Honor, while this defendant is here, the State moves to dismiss the indictment in 1968 -- 1031, in which he was co-indicted with one Robert Sayles for the burglary of the Sears Store.

THE COURT: So ordered.

MR. RICE: We will move to dismiss both defendants. We haven't apprehended the other. It is over a year old.

Berryhill's co-defendant, who had no record of prior convictions, was given time to enlist in the armed forces. When enlistment was denied, his case was referred to the probation officer for investigation. Co-defendant was sentenced to five years probation in March, 1970.

Appellant contends that the sentence of eight to fifteen years is excessive, in that (1) the court did not give proper weight to defendant's reasons for fleeing the jurisdiction or to his activities during his absence, (2) the sentence imposed on appellant is grossly disproportionate to the sentence imposed on the co-defendant for the same offense, and (3) the sentence is based in part on consideration of a separate offense of which defendant was not convicted.

The record indicated appellant's reasons for leaving and remaining away from the jurisdiction to be no more than a desire to avoid the consequences of incarceration upon himself and his newly-acquired dependents. While this motive is understandable, it is not of such extraordinary nature as would transform jumping bail into a showing of virtue in mitigation of the offense for which he was sentenced.



As this court observed in *People v. Tobin*, 276 N.E.2d 828, the basic principles regarding sentencing are set forth in *People v. Jones*, 118 Ill.App.2d 189, 254 N.E.2d 843, 847:

"We recognize that not every offense in a like category calls for an identical punishment. There may be a proper variation in sentences as between different offenders, depending upon the circumstances of the individual case. As a general rule, where the punishment for the offense is fixed by statute, that imposed in the sentence must conform thereto, and a sentence which conforms to statutory regulations is proper. Before an Appellate Court will interfere, it must be manifest from the record that the sentence is excessive and not justified by any reasonable view which might be taken of the record. (*People v. Hobbs*, 56 Ill.App.2d 93, 99, 205 N.E.2d 503 (1965).) Disparity of sentences between defendants does not, of itself, warrant the use of the power to reduce a punishment imposed by the trial court. *People v. Thompson*, 36 Ill.2d 478, 482, 224 N.E.2d 264 (1967)."

The record does not indicate that the appellant was more actively involved than the co-defendant in the instigation, preparation or execution of the burglary. Cf. *People v. Tobin*, supra. Appellant had one prior felony conviction, for which he had undergone three years' probation; his co-defendant had no prior convictions. Although the difference in these co-defendants' backgrounds would support imposition of sentences differing somewhat in severity, we find the difference here to be such as to warrant modification of the appellant's sentence.

The disparity in sentences is not the sole ground for modification of this sentence. At the hearing prior to sentencing, the appellant's prior difficulties with the law -- although not productive of conviction -- were admissible for purposes of considering probation. However, records of offenses of which appellant was not convicted are inadmissible in a hearing in aggravation and mitigation. Where one hearing functions as both probation proceedings and as a hearing in aggravation and mitigation, there is a possibility that the sentence imposed is based in part on matters not properly before the court. As shown in the quotations from the record above, the state's attorney in this case introduced an indictment charging Berryhill and another with a separate burglary. After sentencing, he withdrew that indictment. In *People v. Riley*, 376 Ill. 364, 33 N.E.2d 875, at a hearing in aggravation and mitigation the assistant state's attorney read into the record previous arrests not followed by convictions. The Supreme Court, reversing the sentence, said:



"On a hearing of this kind the prosecutor is under both a legal and moral duty not to offer anything for the consideration of the trial judge which may be of doubtful competency or materiality. On this kind of hearing the attorneys must be held accountable for the highest ethical standards, and if it can be seen that a breach of such standards has prejudiced a defendant it must be expected that any sentence so attained will be set aside." 33 N.E.2d 872, 874.

"Obviously the trial judge owes the same duty to the defendant to protect his own mind from the possible prejudicial effect of incompetent evidence that he would owe in protecting a jury from the same contaminating influence. The prosecutor in such circumstances owes the duty of not only protecting the defendant but also the judge from such prejudicial matter." 33 N.E.2d 872, 875.

In *People v. Grigsby*, 75 Ill.App.2d 184, 220 N.E.2d 498, the trial court, after considering offenses of which the defendant had not been convicted in a hearing on probation, allowed the same material to be introduced in aggravation of the offense. The Appellate Court reduced the sentence, holding that the procedure followed in this case deprived the trial judge of his opportunity to make a sound determination concerning the punishment.

"Evidence incompetent in a hearing in aggravation and mitigation, along with evidence of serious charges which were dismissed for lack of probable cause was heard by, and all proceedings were held before, one particular judge who ultimately assumed the responsibility for determining the adequate sentence. No effort was made to protect him from the prejudicial matter, as required by *People v. Riley* \* \* \*. The trial court, in his discretion, did not avail himself of the opportunity, to allow a judge who had not been subjected to incompetent evidence in aggravation, to determine the punishment to fit the crime." 220 N.E.2d 504.

The conduct of the sentencing proceedings in the present case falls clearly within the area prohibited by *Riley* and *Grigsby*.

Appellant has demonstrated an ability to obtain and hold employment and a sincere desire to provide for the family which he has established. In view of this, and of his present age and age at the time of the offense, we believe that the interest of society be in the punishment and prevention of crime, as well as in the rehabilitation of offenders, and will be adequately served by reduction of the sentence to a minimum of three years and a maximum of eight years.

Sentence modified and  
judgment affirmed.





UNITED STATES OF AMERICA

6 I.A.<sup>3</sup> 545

State of Illinois )  
Appellate Court ) ss:  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Acting Presiding Justice  
Honorable MEL ABRAHAMSON, Justice  
Honorable THOMAS J. MORAN, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

July 21, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:





IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

**FILED**  
JUL 21 1962  
HOWARD K. KELLETT, Clerk  
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
Plaintiff-Appellee	)	Appeal from the 16th
	)	Judicial Circuit, Kane
-vs-	)	County, Illinois
	)	
JOSEPH A. SEGNERI	)	Hon. John S. Petersen
	)	Judge presiding
	)	
Defendant-Appellant	)	

MR. JUSTICE GUILD delivered the opinion of the court:

Defendant appeals his conviction of armed robbery. After defendant was indicted counsel was appointed and a competency hearing found defendant competent. Thereafter, defendant entered a plea of guilty to the charge of armed robbery and was sentenced for a term of 4 - 12 years. The Public Defender was appointed for the purpose of appeal and has filed a motion to withdraw alleging that there are no grounds for a meritorious appeal.

We have followed the dictates of Anders v. California, 386 U.S. 738. The appeal has been considered on the basis of the record, together with counsel's motion and accompanying brief. The record shows that the court properly admonished the defendant of his rights under former Supreme Court Rule 401. At the time of the instant offense defendant was on parole on two concurrent sentences of armed robbery. Upon defendant's plea of guilty herein, another charge of armed robbery and attempt jail escape was nolle prossed. There is no question raised as to the sufficiency of the indictment.

Finding no error, the motion to withdraw is allowed and the judgment of the Circuit Court of Kane County is affirmed.

MOTION ALLOWED; JUDGMENT AFFIRMED.

J. MORAN and J. ABRAHAMSON Concur.



## UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable THOMAS J. MORAN, Justice  
Honorable MEL ABRAHAMSON, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

July 26, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



FILED

JUL 1 1970

HOWARD K. KELLETT, Clerk  
Appellate Court, 2nd District

Abstract

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

---

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
vs.	)	Appeal from the Circuit
	)	Court for the Sixteenth
	)	Judicial Circuit, Kane
WILLIE CLAUDE KIMMONS,	)	County, Illinois.
	)	
Defendant-Appellant.	)	

---

PRESIDING JUSTICE SEIDENFELD delivered the opinion of the Court:

Defendant was convicted of armed robbery, attempted armed robbery, and murder, and sentenced to serve concurrent sentences of two to twenty years, two to fourteen years, and fifty to seventy-five years respectively. In his appeal he claims error in the admission of his statement, argues that he was not proven guilty beyond a reasonable doubt, and alternatively, requests reduction of sentence.

On the night of June 13, 1970 and extending into the morning hours of June 14, 1970, a party was being held in the second floor apartment of Mr. and Mrs. John Anderson at 763 East Benton Avenue, Aurora, Illinois. At approximately 4:30 A.M. of the 14th, while the party was still in progress, a young man burst into the kitchen and announced a stick-up. The man carried a gun, and in the ensuing moments he shot Lee Harden, a guest at the party. The man then fled down the stairs without taking money from anyone in the kitchen, but Frazier Wilson, another guest, testified that the assailant took money from him at the bottom of the stairs. Mr. Harden died soon afterward.





Shortly after the shooting, police officers were dispatched to the scene. Officers Lawrence Coddington and Gerald Soos were three or four blocks away when they got the call, and proceeded to the apartment. They were informed that four or five subjects had run west through the yards, and learned over their car radio that one of the subjects was wearing a blue shirt. It is also undisputed that they knew the men they searched for were black. In circling the area, they observed defendant and another man at the corner of Second Avenue and Union, about one and one-half blocks from the scene of the shooting. One of the men was wearing a blue shirt and partially fit the description the officers had received. The men were asked what they were doing in the area, and said that they were at a party on Benton Street. They were asked for identification, although the two officers disagreed on whether they produced any. The officers read the men their constitutional rights from a card, and placed them under arrest.

After being taken to the police station, defendant made a statement in which he confessed a robbery attempt and explained the shooting as an accident which occurred when there was a struggle for the gun. This statement was admitted into evidence by the trial court after a full hearing on defendant's motion to suppress. Defendant contends that this was error in several respects. First, he argues that the statement was the product of an illegal detention, in that the police did not have probable cause to arrest him. The test of probable cause is whether the arresting officer has reasonable grounds for believing that an offense was committed and that defendant has committed it. People v. Gwin, 49 Ill.2d 255, 258 (1971); People v. Bambulas, 42 Ill.2d 419, 422 (1969), cert.den. 396 U.S. 986, 90 S.Ct. 480; People v. One 1968 Cadillac Automobile Vin #J8316714, \_\_ Ill.App.3d \_\_\_\_,



281 N.E.2d 776, 780 (1972). Whether probable cause exists depends on the totality of facts and circumstances known to the officers. People v. Gwin, supra at 258; People v. McCrimmon, 37 Ill.2d 40, 43 (1967), cert. den. 389 U.S. 863, 88 S.Ct. 120.

The officers here knew that an offense had been committed and that the men who committed it, one of whom was wearing a blue shirt, had run west through the yards. They knew that the men were black. They came upon the defendant and his companion minutes after the occurrence, near the scene of the shooting, and one of the men was wearing a blue shirt. All of this occurred at approximately 4:30 A.M. The men stated that they had been at a party on Benton Street, the street upon which the shooting occurred. Viewing the totality of the facts and circumstances known to the officers at the time of the arrest, there was probable cause for them to believe that defendant had committed the offense.

Defendant next contends that the warnings he was given before making the statement were inadequate under the standards set forth in Miranda v. State of Arizona, 384 U.S. 436, 444, 471, 479 (1966), 86 S.Ct. 1602, 16 L.Ed.2d 694, and therefore the statement should have been suppressed. Before being interrogated, defendant was advised, among other things, that "you have a right to have an attorney present before you answer any questions" and "if you can't afford an attorney, the court will appoint one for you." These warnings, defendant argues, did not apprise him of his right to have an appointed attorney present with him while being interrogated, but indicated that if he desired appointed counsel, one would be provided by the court at some later date.

It is clear that Miranda requires not just a general warning that the defendant has a right to appointed counsel, but a warning that informs the defendant of his right to have such counsel present with him during interrogation. United States v. Oliver, 421 F.2d 1034, 1038 (10th Cir. 1970); Windsor v. United States,



389 F.2d 530, 533 (5th Cir. 1968); United States v. Fox, 403 F. 2d 97, 100 (2nd Cir. 1968). However, Miranda does not require a ritualistic formula to be used without variation, but requires only that the words used must convey the substance of the Miranda requirements along with the required information. The test is whether the words, in the context used, considering the age, background, and intelligence of the individual, impart a clear, understandable warning. People v. Young, \_\_ Ill.App.3d \_\_\_\_, 266 N.E. 2d 160, 164 (1970).

In the context in which the warnings were given here, they were sufficient to inform defendant of his right to the presence of appointed counsel at the interrogation. The warnings were given immediately before defendant was to be interrogated, and obviously referred to the upcoming interrogation. Defendant was told not just that he had the right to consult with an attorney, but that he had the right "to have an attorney present" before answering any questions. He was further warned that the court would appoint an attorney if he could not afford one. This was sufficient. See Coyote v. United States, 380 F.2d 305, 307-309 (10th Cir. 1967), cert. den. 389 U.S. 992, 88 S.Ct. 489; United States v. Ganter, 436 F.2d 364, 369 (7th Cir. 1970).

Defendant next contends that his statement should have been suppressed because the State failed to sustain its heavy burden of demonstrating that he knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Miranda v. State of Arizona, supra at 475. Defendant says that the fact that he failed to respond when asked if he understood the rights just read to him indicates that he did not knowingly and understandingly waive his rights. However, there is testimony that defendant was advised of his rights several times before making the statement, both at the police station and at the





scene of his arrest. In addition, immediately after being asked if he understood his rights, and just before making the statement, he answered, "yes", when asked if he wished to make a statement. There is no evidence that the defendant was of substandard intelligence. He was an eighth grade graduate and an apprentice bricklayer. Viewing the totality of facts present here, one can only conclude that defendant's waiver was both knowledgably and intelligently made. See People v. Marin, 48 Ill.2d 205, 213 (1971); People v. Bey, 45 Ill.2d 535, 539-540 (1970).

Defendant's final contention as to the admissibility of his statement is that it was not freely and voluntarily given. Even if the Miranda warnings are properly given, a statement must be free and voluntary to be admissible. Coyote v. United States, supra at 309. However, the question of voluntariness is for the trial court, and its decision on this issue will not be disturbed unless against the manifest weight of the evidence. People v. Johnson, 44 Ill.2d 463, 469-470 (1970), cert. den. 400 U.S. 958, 91 S.Ct. 356; The People v. Nicholls, 42 Ill.2d 91, 101 (1969) cert. den. 396 U.S. 1016, 90 S.Ct. 578; People v. Carter, 39 Ill.2d 31, 38 (1968). Here, after conducting a hearing, the court found the confession to be voluntary. At the hearing, the thrust of defendant's argument was that one of the detectives had told him someone else had done it and he would receive easier treatment if he made a statement. But this testimony was refuted by the testimony of Officer Beatus, and the court chose to believe the latter. See People v. Bosveld, 109 Ill.App.2d 317, 322 (1969).

Defendant also argues that further evidence that the statement was involuntary is that there was a delay of some twelve to fourteen hours between his arrest and confession, and that he was not presented before a magistrate until his arraignment on July 10, 1970, some twenty five days after his arrest. Neither of





these propositions was presented during the hearing conducted on defendant's motion to suppress, nor were they raised in his post-trial motion. In any event, both are without merit. The record is devoid of testimony that defendant was in any way mistreated during the period between his arrest and confession. In fact, he was allowed to talk to the man with whom he was arrested before making a statement. And while delay in presenting a defendant before a magistrate is a circumstance to be considered in determining the voluntariness of a confession (People v. Johnson, supra at 468-469; People v. Carter, supra at 38-39; People v. Harper, 36 Ill.2d 398, 402-403 (1967)), the common-law record here shows that the criminal complaint charging defendant with murder was filed on June 14, 1970, the day of his arrest; that an arrest warrant issued by a magistrate accompanied the complaint, and was returned and filed on June 15, 1970; and that the defendant was brought before a magistrate on June 15, 1970. Hence, there was no unreasonable delay in presenting defendant before a magistrate. Defendant's argument that his confession was involuntary, as well as his other grounds for suppressing his statement, must fail.

Defendant also contends that the State failed to prove him guilty of the alleged crimes beyond a reasonable doubt. Interwoven with this is the argument that in making this determination, the in-court identification testimony of witnesses to the crimes should have been excluded as being unnecessarily suggestive and conducive to irreparable mistaken identification. While defendant made no motion to suppress the identification testimony or objected to it, and the issue was not raised in his post-trial motion, we have chosen to deal with the contention on its merits.

Defendant states that the suggestiveness of the in-court identifications is caused by the fact that in a courtroom situation, a defendant is presented as the party accused of the crime,



and the identification takes on the characteristics of a one to one show up. The only case cited which deals with an improper in-court identification (not involving the effect of suggestive pre-trial identification) is People v. Carroll, 119 Ill.App.2d 314, 318-319 (1970), and there the defendant was brought into the courtroom by a bailiff, was the only black person in the area except the bailiff, and was known by the witness to have already been identified as the guilty party by the witness' brother.

In effect, defendant's argument amounts to a contention that a pre-trial line-up should have been held, and in the absence of one, the in-court identifications were unnecessarily suggestive. However, it is well established that Illinois law does not require a line-up to insure the identification of a defendant. People v. Hill, 121 Ill.App.2d 377, 380 (1970); People v. Brinkley, 33 Ill.2d 403, 406 (1965); People v. Capon, 23 Ill.2d 254, 256 (1961), cert. den. 369 U.S. 878, 82 S.Ct. 1151; People v. Schmidt, 364 Ill. 313, 317 (1936); People v. Barad, 362 Ill. 584, 588 (1936). The in-court identifications were not unnecessarily suggestive and did not deny defendant due process.

On the whole record we conclude that defendant was proven guilty beyond a reasonable doubt.

Frazier Wilson testified that he had started into the kitchen from the hall when the shooting began, and that he then went downstairs. When he reached the bottom of the stairs he was confronted by a man who ordered him to turn over his money, which he did. He identified the defendant as the man. When asked what he did after handing over the money, the witness said, "As I seen him, I ..... the first thing I looked off. I did not want to look at him too much. I thought he might shoot me. I looked off. I looked out ..... "

John Anderson testified that he was in the kitchen when a man with a gun in his hand came in and announced a stick-up. He stated



that the man pushed Harden, the victim, against him, that Harden turned around and took one step with his arms up, and the man started shooting. Anderson said the gun was in the area of Harden's chest, that he both saw and heard the gun go off, and that two shots were fired. Anderson then got up off the floor and tried to get out the door. Anderson identified defendant as the man who entered the kitchen, and said that defendant and Harden were definitely not fighting over possession of the gun.

Gladys Harden, unrelated to the victim, testified that she was in the kitchen when a man with a gun, whom she later identified as the defendant, ran in and yelled, "This is for real. I am not kidding. This is a stick-up." Mr. Harden yelled, "Wait a minute, man!" After running from the kitchen she heard a shot, fell in the hallway, heard another shot, and ran into the bathroom.

Mary Coon testified that she was standing in the kitchen when a man with a gun came in, walked to the middle of the floor, and announced a holdup. The man walked close to the side of Lee Harden, who was standing almost directly in front of her. She then ran to the bathroom from where she heard two shots. She also identified the defendant as the man she saw in the kitchen.

Frankie Anderson testified that she was in the kitchen when a man with a gun came in, announced a stick-up, and then walked over and punched Lee Harden in the side with the gun and shot. After the shot she ran into the hallway closet and heard another shot. She too identified the defendant, and stated that Harden made no menacing gesture or move toward the intruder, but just turned toward him before being shot.

In defendant's statement, he indicated that the victim made a motion toward him and he pushed the victim back; that the victim kicked him in his midsection, and the gun fell from his





hand and went off; and that as the two men struggled for it, the gun went off again. He stated that he did not take money from anyone at the bottom of the stairs.

Five witnesses positively identified the accused and, although they saw the gunman for only a short time under confused circumstances, the jury found their testimony credible. Viewing the identifications in conjunction with the defendant's statement, the verdict of the jury was supported by the evidence and was not so unsatisfactory as to cause a reasonable doubt of defendant's guilt.

The final argument advanced by defendant relates to his sentence of fifty to seventy-five years for murder. He asserts that the minimum sentence of fifty years is excessive in that it destroys any incentive he might have to participate in the rehabilitation programs provided him, and would likely hold him in prison after effective rehabilitation has occurred. However, defendant's crime was one of extreme severity, and the result of an attempted armed robbery. In addition, the trial court was aware that defendant had twice been convicted of Criminal Trespass to a Vehicle, had one conviction for Criminal Trespass to Property, and had another for assault. The penalty does not so depart from the fundamental law and its spirit and purpose that we should exercise our power to reduce it.

The judgment below is affirmed.

AFFIRMED.

ABRAHAMSON and MORAN, J.J. concur.



## UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable THOMAS J. MORAN, Justice  
Honorable WILLIAM L. GUILD, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

July 26, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



NO. 71-377

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

JUL 2 1972

HOWARD V. KELLEY, Clerk  
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
Plaintiff-Appellant	)	Appeal from the 19th
	)	Judicial Circuit
-vs-	)	
	)	Hon. Thomas R. Doran
DIANE SUE LAMB	)	Magistrate presiding
	)	
Defendant-Appellee	)	

NO BRIEF FILED FOR APPELLEE

MR. JUSTICE GUILD DELIVERED THE OPINION OF THE COURT:

Motion was made in the Supreme Court to dismiss this appeal. Prior to transfer of the appeal to this court the Supreme Court denied this motion. This issue has been adjudicated and therefore is not before this court.

A resume of the chronology of the unusual proceedings herein is necessary at the outset. The defendant was charged with driving while intoxicated and was tried by a jury which found her guilty on the 13th of June, 1969 in Cause #69 T 15437. A motion was made by the defendant for a new trial. The grounds for said motion do not appear in the record herein. The court set aside the verdict and granted a new trial which was set for July 2nd. On that date the State moved for a continuance supported by affidavit, stating that a material witness was on vacation outside the State. We set forth the record pertaining thereto, viz.,

"THE COURT: All right. The record now shows that the People's motion for a continuance is denied. What is the next step?

MR. ARKEMA: Judge, the People are prepared to have its witness in here in approximately the amount of time it will require to impanel a jury.

THE COURT: Mr. Hartel?



MR. HARTEL: It's now quarter after three, and I am disturbed that the State is now going ahead to trial in the absence of their obviously material witness, which they swore as being material.

This matter came up for trial at 9:30 this morning, and it is now 2:15 and I think the defendant was entitled to a trial this morning, and it would be an imposition on all the parties involved, including the jury -- and I doubt whether you have a jury now -- but to start a jury trial at 2:30 in the afternoon --

THE COURT: Are you moving for a dismissal?

MR. HARTEL: Yes, I am moving for a dismissal for want of prosecution.

THE COURT: Motion for dismissal for want of prosecution is allowed.

MR. ARKEMA: State has answered ready, and State is still ready.

THE COURT: State has not answered ready.

MR. ARKEMA: I said the State was ready to proceed in the amount of time it would take to impanel a jury.

THE COURT: The Court has ruled on the motion for dismissal for want of prosecution, and the record will close."

The State's Attorney then filed a new information against the defendant in Cause #69 CM 98. On November 10th, 1969, the defendant moved to dismiss the new information on the basis of double jeopardy. The court stated that his order dismissing the case was "an improper termination of the proceedings" and went on to say "and because it was an improper termination the subsequent prosecution is barred and the relief that the State may have had would have lain, as it were, in an appeal from that order." It is difficult to determine from the record before us exactly what the reasoning of the court was.





It is obvious that the court's action in refusing to grant the continuance and dismissing the cause was improper. The only grounds for the dismissal of an information or indictment without trial are found in Section 114.1 of the Code of Criminal Procedure (Ill. Rev. Stat. 1969, Ch. 38 § 114-1. The State instead of appealing, however, filed a new information where the original proceedings were dismissed in error. This court does not believe that the dismissal of the original proceedings herein bars further prosecution. The jury's verdict was set aside upon the motion of the defendant. Subsequently, upon the motion of the defendant again, the cause was improperly dismissed. This does not bring the instant case within the provisions of Ill. Rev. Stat. 1969, Ch. 38 § 3-4 (a-3) which reads:

- "(a) A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution:
- (3) Was terminated improperly after the jury was impaneled and sworn or, in a trial before a court without a jury, after the first witness was sworn but before findings were rendered by the trier of facts, or after a plea of guilty was accepted by the court."

As the State points out, no jury was impaneled and no witness was sworn in the new trial. Defendant was therefore not in jeopardy in the new trial.

In People v. Miller, 35 Ill.2d 62, 219 N.E.2d 475 (1966), the court stated in quoting section 3-4 (a) (1) of the Code of Criminal Procedure (Ill. Rev. Stat. Ch. 38 § 3-4 (a) (1) (1965):

- "(3) . . . One condition remains and this is contained in the introductory sentence and first clause of the subparagraph of the section, wherein it is provided that, "A prosecution is barred \* \* \* if such former prosecution: (1) Resulted in either a conviction or an acquittal, \* \* \*." This language cannot be ignored



and it is clear that this is a condition which is descriptive of the former prosecution and is as essential to the application of the section as is the existence of any one of the conditions descriptive of the subsequent prosecution. Necessarily, therefore, where the former prosecution resulted in a mistrial and not in a conviction or acquittal, the section is inapplicable and the trial court and the appellate court erred in ruling that subsequent prosecution of the additional charges was barred."

The ruling above is even more applicable in the instant case where the defendant moved for and was granted a new trial, and then at the urging of the court the charges were dismissed for want of prosecution upon the motion of the defendant.

The setting aside of the verdict of the jury and the granting of a new trial is tantamount to placing the defendant in the same status as though no trial had been had, there being no acquittal nor conviction. As the Supreme Court further stated in People v. Piatt 35 Ill.2d 72, 219 N.E.2d 481 (1966) in adopting the Miller result:

"...subsequent prosecution on different charges arising from the same conduct is barred under Section 3-4 (b) (1) of the Criminal Code of 1961 only if the former prosecution resulted in a conviction or an acquittal."

In People v. Barksdale 110 Ill.App.2d 163, 249 N.E.2d 165, (1969), a most similar factual situation is found. There, the State requested a continuance for additional witnesses, and over the State's objection, the trial court suggested and granted defendant's motion for a dismissal for want of prosecution. The Appellate Court held that the court had no power to dismiss an indictment under Sec. 114-1 of the Code, supra, under this factual situation. See also People v. Schick 101 Ill.App.2d 377, 243 N.E.2d 285 (1968), People v.



Rinks, 80 App.2d 152, 224 N.E.2d 29 (1967).

In People v. Stowe 51 App.2d 411, 201 N.E.2d 465 (1964) (abstract) the court there held that a subsequent trial under a new indictment making identical charges did not place the defendant in double jeopardy where he had successfully moved to vacate the verdict of the jury resulting in the State nolle prosequi and the filing of new charges.

We therefore find that the order dismissing the new information #CM 98 filed subsequently was in error.

The judgment in Cause #CM 98 is reversed and the case remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

P.J. SEIDENFELD and J. MORAN Concur.





6  
FILED  
JUL 6 - 1972

No. 71-187

IN THE

*Walter T. Simmons*  
FIFTH DISTRICT OF ILLINOIS  
CLERK APPELLATE COURT

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ABST.

MORRIS CAMPBELL, GEORGE DURR,  
LAWRENCE TOLAR and WILLIAM  
EBERSOLDT, Trustees, and THE  
EAST SIDE LEVEE and SANITARY  
DISTRICT, a municipal corporation,

Plaintiffs-Appellees,

vs.

ROMEL WILBON, LEROY G.  
ROBERTS, EDDIE EZELL, WALTER D.  
GREATHOUSE and VON DEE CROUSE,

Defendants-Appellants.

Appeal from the Circuit Court of  
St. Clair County, Illinois.

Honorable Howard Lee White  
Judge Presiding.

MR. JUSTICE EBERSPACHER delivered the opinion of the court:

Plaintiffs filed their complaint in July 1971 alleging that they were the duly elected, qualified and acting Trustees of the East Side Levee and Sanitary District and alleging that defendants had announced publically their intention to take over the operation of the District on the theory that they had been elected to fill vacancies in the office of Trustee of the District; and that in fact, their offices had not been vacated, and that the threatened take over by defendants would cause irreparable damage to the District and its general operation, and that plaintiffs had no adequate remedy at law. Plaintiffs sought to enjoin defendants from interfering with the operation of the District. The court denied defendants' motion to strike the complaint, and granted injunctive relief, giving defendants until July 23 to file further pleadings, and set the matter for trial. On July 16, defendants filed notice of interlocutory appeal.

The Plaintiff Trustees had, in 1970, been convicted of misconduct in office and had promptly appealed their conviction to this Court and had prayed this Court to stay the convictions and the order removing them as trustees. On December 5,



1970, an order was entered in this Court staying all orders entered in that cause, pending the determination of the appeal or until further order of this Court. The propriety of this Court's stay order was questioned in the Supreme Court in *People, ex rel. Rice v. The Appellate Court of Illinois, et al*, 48 Ill.2d 195, 268 N.E.2d 420, by which the action of this Court in granting the stay order was approved on April 1, 1971. On December 10, 1970, writs of election were issued for special elections to fill the alleged vacancies. Pursuant thereto a special primary and special election were held by which defendants claimed election and purported to qualify as Trustees.

In *People v. Campbell*, 3 Ill.App.3rd 984, 279 N.E.2d 123, we reversed the convictions for misconduct in office of the trustees who are plaintiffs in this cause. Petition for leave to appeal in that cause was denied by the Supreme Court, (See Cause No. 45076, Supreme Court State of Illinois), on May 25, 1972.

As a result of the foregoing, the question of the propriety of the issuance of a temporary injunction in this cause has become moot, and we therefore dismiss this appeal.

Appeal Dismissed.

CONCUR: /S/ Charles E. Jones

CONCUR: /S/ Caswell J. Crebs

PUBLISH ABSTRACT ONLY



6 I.A.<sup>3</sup> 603

71-295

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable MEL ABRAHAMSON, Justice  
Honorable WILLIAM L. GUILD, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

July 27, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

---

---

IN THE INTEREST	)	
	)	
OF	)	Appeal from the Circuit
	)	Court of McHenry County
JOSE LUIS GONZALES	)	

---

MR. JUSTICE ABRAHAMSON delivered the opinion of the court:

Appellant, a minor, was adjudicated delinquent and found a ward of the court on December 19, 1969 under the Juvenile Court Act. Dispositional hearings were held and continued with respect to that judgment.

On October 21, 1970, a supplemental petition was filed alleging that subsequent to the date of the December 1969 judgment, the minor respondent committed burglary, robbery, attempted rape and battery. On December 11, 1970, the court found that the minor committed battery and confirmed the findings of delinquency and wardship entered on December 19, 1969. (The court found in defendant's favor as to the charges of burglary and robbery, while the charge of attempted rape was dismissed upon the respondent minor's motion.) This appeal is from the adjudication of December 11, 1970; no appeal was taken from the adjudication of December 19, 1969.

Thereafter further dispositional hearings were held in connection with the adjudication of December 19, 1969 and on the basis of that adjudication the minor was committed to the Department of Corrections of the State of Illinois, Juvenile Division.

The record indicates that on October 18, 1970 at about 2:20 a.m. the complaining witness, a 55 year old woman, telephoned the Woodstock police station, and then reported to them that she had been awakened in her home, robbed of \$5 and beaten by a young man. She described the intruder who entered her bedroom as being





5'9" to 6' tall, with a thin build and light complexion, and turned over to the police a wallet which the intruder dropped on the sofa while he was trying to rape her. In the wallet were respondent's Social Security card and his membership card in a "teen club." Two other identification cards were issued to one Salvatore Quintanilla. Prior to trial she picked respondent's photograph from among the photographs of eight other young men, and identified respondent's photograph as being the photograph of her assailant. After that the police officer told her that the respondent was in custody.

On appeal respondent contends that the pre-trial photographic identification and the in-court corporeal identification of respondent were unnecessarily suggestive and conducive to irreparable mistaken identification, and thus constituted a denial of due process.

The petitioner argues that respondent's failure to move to suppress the in-court identification or to object to the admissibility of testimony concerning the pre-trial photographic identification constituted a waiver of such point. While that is the general rule (People v. Touhy, 31 Ill.2d 236, 240), this court may in its discretion consider errors that have not been properly preserved for review. See People v. Bradley, 30 Ill.2d 597, 601.

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The victim testified that prior to trial she picked respondent's photograph from among eight other photographs, and that when she was shown the photographs she directed her attention only to the faces shown; neither the typing on some of the cards, nor the length or color of hair on the others made any impression on her. The officer did not inform her that the respondent was in custody until after she identified his photograph as that of the offender. It is clear from the record that there was nothing suggestive in the photographic identification procedure.



In her testimony the victim accurately described the respondent even though he was not present in court, having been excused--on his own motion--from being present during the hearing, and all witnesses, spectators, and probation officers having been excluded from the courtroom on motion of respondent's counsel. When the petitioner sought to have the witness pick respondent's photograph from among those of the eight other youths, respondent's counsel interrupted and stipulated that she would pick out respondent's photograph. It should be noted in this connection that, at the conclusion of all the evidence, respondent offered all photographs into evidence as his own exhibits and they were so received.

At the hearing the victim testified that she was sure that respondent was the person who attacked her in her home. She first observed him in her bedroom about 1:30 a.m. on October 18, 1970. He demanded money and they went downstairs where there were "quite a few lights on." They conversed upstairs as well as downstairs where she handed him the five dollars. The respondent then hit her for about 15 minutes and got on top of her. After he left she found on her davenport the wallet above referred to containing, among other things, respondent's Social Security card and his membership card in a teen club.

Another witness testified (under subpoena) that she was respondent's cousin, that she lived across the street from the victim, and that the respondent left her home about 12:45 a.m., which was not long before the intruder entered the victim's bedroom.

Since the victim had adequate opportunity to observe the respondent, and there is little likelihood that the procedure used in the pre-trial photographic identification and the in-court identification of the respondent led to mistaken identification, the judgment of the trial court will not be set aside. See People v. Fox, 48 Ill.2d 239, 246.



Accordingly, the judgment of the circuit of McHenry County is affirmed.

JUDGMENT AFFIRMED.

GUILD, J. and SEIDENFELD, P.J., concur.





## UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable MEL ABRAHAMSON, Justice  
Honorable WILLIAM L. GUILD, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

July 27, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



Abstract

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

RECEIVED  
JAN 10 1971  
CLERK OF COURT  
JAN 10 1971

---

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee	)	
	)	
vs.	)	Appeal from the Circuit
	)	Court of the Nineteenth
	)	Judicial Circuit, Lake
	)	County, Illinois.
RONALD E. GUBALA,	)	
	)	
Defendant-Appellant.	)	

---

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

On December 30, 1968, the defendant, Ronald E. Gubala, pleaded guilty in the circuit court of Lake County to a charge of burglary. On January 16, 1969, the court denied Gubala's motion for probation and sentenced him to the penitentiary for a term of 5 to 10 years. In July, 1969, the defendant filed a pro se petition seeking relief under the Post-Conviction Hearing Act (Ill. Rev. Stat. 1969, Ch. 38, par. 122-1 et seq.). In August, 1969, an amended petition was filed that was dismissed without an evidentiary hearing on May 15, 1970. An appeal was taken from that order of dismissal to the Supreme Court in September, 1971. On October 8, 1971, the cause was transferred



to this court by order of the Supreme Court pursuant to Supreme Court Rule 651. (Ill. Rev. Stat. 1971, ch. 110A, par. 651).

In his verified petition the defendant alleged, inter alia, that he had entered a plea of guilty in reliance on the advice of his court-appointed counsel that the prosecutor would recommend a sentence of 1 to 5 years. On May 15, 1970, he filed an affidavit stating that the attorney informed him that he had made a "deal" for him whereby he would receive the lesser sentence and that if the matter proceeded to trial he would receive a sentence of 12 to 20 years. Gubala stated further in the affidavit that "All during my hearing, each time I would start to say anything or made an inquiry of the court, my lawyer would tell me to keep quite (sic), and not worry; All that was going on was just court procedure..."

The defendant here contends that his verified petition alleged sufficient facts to show a substantial denial of his constitutional rights and that the failure of the court to hold a hearing on the petition was a denial of due process of law.

The United States Supreme Court has held that a plea of guilty, if induced by promises which deprive it of the character of a voluntary act, is void. Machibroda v. United States, 368 U.S. 487, 493, 82 S. Ct. 510. Our Supreme Court has said that "A prosecutor's unfulfilled promise of a reduced sentence, or a misrepresentation by the trial judge as to the sentence to be imposed, invalidates a plea of guilty." The People v. Washington, 38 Ill. 2d 446, 232 N.E. 2d 738, 740.

The defendant cites the Washington case, and others, to support



his contention that a hearing should have been held on his amended petition.

In the Washington case, the defendant pleaded guilty to murder and was sentenced to the penitentiary for 25 years. In his post-conviction petition Washington alleged that his attorney had advised him that the prosecutor and trial judge had agreed to a sentence of 14 years and his plea was made in reliance on that advice. The petition was dismissed on the motion of the State without a hearing. The Supreme Court stated that. "The defendant's sworn allegation may seem improbable.....but the allegation remains undisputed, and a hearing should be had to determine its truth or falsity." The People v. Washington, 38 Ill. 2d 446, 232 N.E. 2d 738, 740.

In The People v. Sigafus, 39 Ill. 2d 68, 233 N.E. 2d 386 , the defendant pleaded guilty to a charge of theft and was sentenced to a term of 2 to 7 years. In his post-conviction petition, Sigafus alleged that the prosecutor had promised him in the hallway outside the courtroom that the charge would be reduced to a misdemeanor and a sentence of 6 months to 1 year imposed. The State filed an affidavit that denied that any representations or promises with respect to sentence had been made and the petition was dismissed without a hearing. The Supreme Court reversed the trial court and remanded the cause for an evidentiary hearing since the conflicting allegations created a factual issue "...upon which the record casts no helpful light."

In the more recent case of The People v. Williams, 47 Ill. 2d 1, 264 N.E. 2d 697 , the defendant pleaded guilty to two indictments





for armed robbery and was sentenced to concurrent terms of 3 to 7 years. In his pro se petition, Williams alleged that his pleas were induced by the representation of his attorney that he would receive a sentence of six months to 1 year if he pleaded <sup>guilty</sup>/instead of 40 to 80 years if he went to trial. The trial court dismissed the petition, without a hearing, and was reversed by the Supreme Court and ordered to conduct a hearing. The court said, p. 4:

"Here the record is meager, to say the least. Denial of a substantial constitutional right is factually alleged by petitioner and denied by the State with nothing more to guide the court in its determination. Under such circumstances the dispute cannot be resolved without some evidentiary inquiry into the truth or falsity of petitioner's factual allegations."

In our case, the following exchange took place between the trial court, the defendant and his attorney, before the court accepted Gubala's plea:

"Q. All right. Now, let me move into this area. The Court recognizes that prior to your pleading guilty here, there was a suggestion of a possible acceptable plea and an acceptable sentence by the State's Attorney, and your Counsel, Mr. Wilson, at which time the State was recommending a sentence of one to five years. And you were present at that conference?

A. Yes.

Q. You understand the Court, after hearing some of the background, indicated to both your counsel and to the State's Attorney, and indicated to you, that it felt that the Court could not accept such a recommendation at this stage in the proceeding, but, rather, the Court wanted a hearing in mitigation and aggravation, in which the Court would decide what the penalty should be in this case.

You understand that?



A. Yes.

Q. The Court is telling you this because the Court wants you to know that whether or not the State's Attorney makes a recommendation, it would not be binding upon the judge who hears the matter in mitigation and aggravation.

Now, do you fully understand that?

A. Yes, sir.

Q. In other words, there are no promises made to you at this stage either by Mr. Wilson or by the State's Attorney, or anyone else, as to what the judge who hears the matter in mitigation and aggravation might do with reference to sentence in this matter. You fully understand?

A. Yes.

Q. Now, other than this matter which we had the conference on, have any other promises been made to you to induce you to change your plea from not guilty to guilty?

A. No, sir.

Q. And the Court wants you to fully understand, and you do, that these recommendations made previously are all withdrawn at this time.

A. Yes, sir.

Q. So that you are telling the court now you fully understand that no promises are outstanding as to what is going to happen to you in this matter with reference to sentencing you if you plead guilty?

A. Yes, sir.

Q. And you have thought this over carefully?

A. Yes.

Q. And you still want to change your plea from not guilty to guilty?

A. Yes.



(sic)  
Q. Fulling/understanding that?

A. Yes.

Q. No police officer and no one from the State's Attorney's office, no one has made any promises to you as to what is going to happen to you; is that right?

A. Yes.

Q. Now, has anybody brought any threats to get you to change your plea from not guilty to guilty?

A. No.

Q. The persons who arrested you or anyone else along the line, the State's Attorney, or has your own attorney suggested to you somebody was applying pressure on any of your relatives, or anyone else, to get you to change your plea?

A. No.

Q. You do this freely and voluntarily of your own wishes; is that right?

A. Yes.

Q. And you have conferred with Mr. Wilson about this?

A. Yes.

MR. WILSON: Your Honor, may I ask a question first?

Q. Ronnie, you understand if there is any reservation in your mind about the proceeding now, now is the time to speak.

You understand what the judge has told you and what I have told you? If you have any doubt in your mind, now is the time to express them.

You fully understand everything that has been said?

A. Yes. "





In The People v. Morris (43 Ill. 2d 124, 251 N.E. 2d 202), the Supreme Court upheld an order of the trial court that dismissed the defendant's post-conviction petition without an evidentiary hearing where the record itself refuted the allegations of the petition that his plea was induced by a promise of probation. The court said, p. 128:

"Moreover, the denial of an evidentiary hearing and the granting of the State's motion to dismiss were proper since the circuit court, upon a motion to dismiss a post-conviction petition, may render its decision on the basis of what is contained in the pleading to which the motion is directed, considered with the transcript of the trial or other proceedings..."

Similarly, in the case of The People v. Spicer, 47 Ill. 2d 114, 264 N.E. 2d 181, a post-conviction petition based, in part, on the allegation of the defendant that his plea to a burglary charge was induced by an unfulfilled promise of probation, was held properly dismissed without a hearing where it appeared from the record itself that the plea was not wrongfully induced.

The record before us amply refutes the allegation that Gubala was induced to plead guilty on the promise of a sentence of 1 to 5 years. The record is neither "meager" (such as in Williams) or is it devoid of a "helpful light" (such as Sigafus) with which the petition can be considered.

The record indicates that the trial court, at great length, admonished the defendant that it was not bound by any recommendations and specifically was unwilling to follow any recommendation of a 1 to 5 year sentence until a hearing in mitigation and



aggravation was completed. The court painstakingly determined that Gubala acted with full understanding of his rights and the possible consequence of his plea. It also discloses that Gubala's attorney, contrary to the allegations in the petition, did not seek to keep him quiet at the hearing but sought his response and understanding.

Under these circumstances, we are of the opinion that the testimony of the defendant in support of his allegations would have been of scant credibility and that the dismissal of the petition without an evidentiary hearing was not error.

The order of the trial court will therefore be affirmed.

AFFIRMED.

SEIDENFELD, P. J., and GUILD, J., Concur.



6IA<sup>3</sup> 611

71-326

UNITED STATES OF AMERICA

ABSTRACT

State of Illinois )  
Appellate Court ) ss:  
Second District )

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable THOMAS J. MORAN, Justice  
Honorable MEL ABRAHAMSON, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On  
July 27, 1972 the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:



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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

---

Received & filed  
Appellate Court, 2/1/54

Abstract

---

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	Appeal from the Circuit
	)	Court of the Eighteenth
GARY REDMAN,	)	Judicial Circuit, DuPage
	)	County, Illinois.
Defendant-Appellant.	)	

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PRESIDING JUSTICE SEIDENFELD delivered the opinion of the Court:

Defendant has appealed from a conviction of voluntary manslaughter after his negotiated plea of guilty with a sentence of 12 - 20 years.

The Public Defender of DuPage County, as counsel for defendant, has asked leave to withdraw, stating that the appeal is frivolous in that the only issues present relate to the admonishment of the defendant and whether his plea was voluntarily and intelligently entered but that the record shows that these are purely illusory issues.

We have examined the entire record and agree that the trial court fully and properly admonished the defendant before accepting the plea and that it sufficiently appears from the record that the plea was voluntarily and intelligently entered. We therefore grant the motion of the Public Defender to withdraw. The judgment below is affirmed.

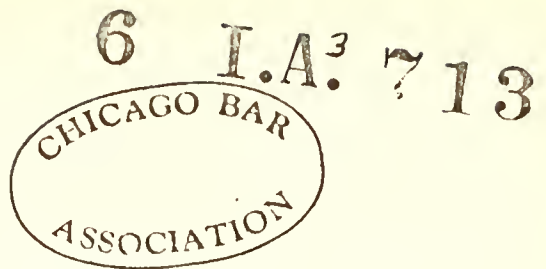
AFFIRMED.

ABRAHAMSON and MORAN, J.J. concur.

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55859

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.	)	
	)	
EDGAR WILLIAMS,	)	
	)	Hon. Robert J. Collins,
Defendant-Appellant.	)	Presiding.

**ABST.**

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

Edgar Williams (defendant) was found guilty by a jury of the murder of his wife. He was sentenced to 50 to 100 years in the penitentiary. He appeals. An original and a supplemental brief and argument have been filed here in his behalf. It is contended: 1) that the evidence could support a verdict of manslaughter so that an instruction defining this offense should have been given; 2) that defendant's rights to remain silent and to a fair trial were violated when the prosecution communicated to the jury the fact that he had refused to make an exculpatory statement prior to trial; and 3) that the sentence was excessive. A brief review of the facts is essential.

On certain points there is no evidentiary conflict. It is agreed that defendant and his wife had a child some 18 months of age. Since the end of November or December, 1969, the wife and child had gone to stay with her aunt and uncle at their home. The aunt and uncle have four small children. At one point during the evening on April 1, 1970, decedent, two of her sisters and their aunt left the residence of the latter and went to a bar and then to a tavern together to hear some "recording artists." The four children of the aunt and uncle, together with the small child of defendant and decedent, were all left home in the care



of a baby-sitter, a girl some 13 years of age. The uncle arrived at the home shortly after the ladies left.

Defendant came to the home at about 7:30 p. m. He did not, at that time, see the baby-sitter or his wife's uncle. He waited for his wife to return. During this time, he watched television and had a rum drink. The deceased called the home at about 9 o'clock and defendant spoke with her. She, her aunt and one of her sisters returned home at about 3:00 o'clock in the morning. From this point on, the evidence is directly conflicting. It need not be recited in great detail.

The substance of the testimony given by all three of the women, and by the uncle and verified in part by the baby-sitter, is simply that the defendant and decedent exchanged heated words about whether defendant should take their child and defendant shot the deceased four times thus causing her death. There is also evidence that defendant attempted to shoot deceased again when she was lying on the floor but the gun was empty. It appears amply from the testimony that defendant had possession of the gun when he entered the apartment.

Defendant testified, on the contrary, that he entered the apartment unarmed and that he and his wife quarreled because, as he believed, their child had been left alone with the four other children and without a baby-sitter. He further testified that his wife then left the room and returned with a butcher knife. At the same time, he saw his wife's uncle coming toward him with a gun which he was in the process of loading. He also testified that his wife's aunt began throwing objects at him. He grappled with the uncle and finally was able to obtain possession of the gun. He then began shooting at his wife and she fell. The shots were fired at her when she was approximately one and one-half or



two feet away from him. He put the gun in his back pocket, picked up his child and ran out of the house. At that time, it was snowing very heavily and the snow was about one foot deep. The child was dressed in a pair of pajamas and a pair of socks. He walked some 15 blocks until he came to the home of a friend of his where he called the police.

No point is raised in either brief filed for defendant on the sufficiency of the evidence to prove guilt of murder beyond a reasonable doubt. In our opinion, the evidence is ample to support the verdict of guilty of murder beyond any reasonable doubt. Defendant's testimony regarding aggression by others is entirely uncorroborated by any other eyewitness and it is overwhelmingly contradicted by other evidence.

The only point raised in the original brief is that the jury should have been instructed on voluntary manslaughter. Ill.Rev.Stat. 1969, ch.38, par.9-2. Defendant urges that there is sufficient evidence of serious provocation which could reasonably have caused sudden and intense passion.

The law of Illinois adheres to the principle that mere words or gestures are not sufficient to constitute serious provocation as required for the offense of voluntary manslaughter. People v. Rodriguez, 129 Ill.App.2d 1, 262 N.E.2d 815. See also People v. Tucker, 3 Ill.App.3d 152, 155, 278 N.E.2d 516. The evidence here shows simply an argument between husband and wife lasting for some time without any act which might be construed as serious provocation.

When this matter was submitted to the trial judge, he properly ruled that there was no evidence of serious provocation and he accordingly refused to instruct the jury regarding this type





of voluntary manslaughter. The court also ruled that there was some evidence in the record which justified submission to the jury of instructions tendered by defendant defining voluntary manslaughter based upon belief by defendant of circumstances which, if they existed, would justify the homicide but such belief was unreasonable. Ill.Rev.Stat. 1969, ch.38, par.9-2(b). The trial court then proceeded to instruct the jury with reference to the elements and the issues of voluntary manslaughter of this type. These rulings by the trial court were completely correct. We find no error in the instructions and find no meritorious point raised in defendant's original brief.

The first point in the supplemental brief is an assertion of violation of defendant's constitutional rights with reference to communication to the jury of the refusal of defendant to make a statement to the police. The basic principles raised by defendant in this regard are valid. See *People v. McDowell*, \_\_\_\_\_ Ill.App.3d\_\_\_\_\_, 280 N.E.2d 471 and decisions therein cited. But the record here does not present a situation which requires or permits their application.

On direct examination of defendant, his trial counsel brought before the jury the fact that when defendant arrived at his friend's home with his young daughter, he called the police. The purpose of this testimony was to show the jury that defendant had remorse and also to add plausibility to his testimony that he did not act with malice but only under circumstances consistent with manslaughter.

On cross-examination, the State's Attorney asked if defendant had called the police and whether they came. Affirmative responses were given to these questions without objection. The State's Attorney then asked if defendant told "everything" to the police. The defendant responded, "No." The next question





was, "Q. What did you tell them?" An objection was made by defendant's counsel which the trial court immediately sustained. In a conference out of the presence of the jury, the court reminded the State's Attorney that he had already told counsel and the court that no statements by defendant were to be relied upon. The court then, in the presence of the jury, ordered that the question be stricken and that the jury be instructed to disregard it.

We approve of this action of the trial court. The questions put by the cross-examiner were heading toward a situation which might conceivably have conflicted with the principle urged in defendant's supplemental brief. However, because of the prompt and correct action of the court, this issue was avoided. We find specifically that this incident created no prejudice to any rights of defendant; that it raised no constitutional question of any kind and that it did not constitute reversible error.

Defendant urges, however, that the same constitutional issues were raised by closing argument of the State's Attorney. In final argument the State's Attorney said to the jury:

"Then he said he went out and he had the baby. He gathered up the baby and then he went out and walked with her for two hours. I asked him. And then he went over to a friend's house where he called the police. And I asked him did he tell anybody else the story, the fantastic story? Did you tell anybody else this story? No. This event happened April 2nd of 1970. Today is October 5th of 1970. You can think of a pretty good story in that time. I think he could have done a lot better because the one he told is fantastic and unbelievable."

No objection was raised at trial to this argument or to the testimony at which it was directed. Therefore, this point is waived and may not be considered on appeal. *People v. Hudson*, 46 Ill.2d 177, 197, 263 N.E.2d 473; *People v. Wilson*, 46 Ill.2d 376, 382, 263 N.E.2d 856. Failure of competent counsel to raise



this question at trial, together with failure of appellate counsel to raise the point in the original brief in this court, serve to support the conclusion that the argument was not prejudicial. Furthermore, we cannot find from this record any substantial prejudice to the defendant from this assailed argument. The evidence of guilt here is strong and convincing. It does not appear that the verdict of the jury would have been different if the argument had not been made. *People v. Trice*, 127 Ill. App.2d 310, 319, 262 N.E.2d 276. *People v. Nicholls*, 42 Ill.2d 91, 100, 245 N.E.2d 771.

We find no prejudicial error in this record. The guilt of defendant has been established beyond reasonable doubt as a result of a fair trial before a vigilant and able judge. The conviction is therefore affirmed.

The final point to be considered is whether the sentence of 50 to 100 years is excessive. The legal principles regarding exercise of our authority to reduce sentence are readily stated. We may not exercise this authority unless the sentence is greatly at variance with the purpose and spirit of the law; *People v. Hampton*, 44 Ill.2d 41, 48, 253 N.E.2d 385, and then we should proceed with "considerable caution and circumspection." *People v. Holmes*, 127 Ill.App.2d 209, 214, 262 N.E.2d 45. On the other hand, we have a well established and serious duty to make certain that the sentence is proportionate and justified by all of the pertinent facts and circumstances. *People v. Livingston*, 117 Ill.App.2d 189, 193, 254 N.E.2d 64; *People v. Lillie*, 79 Ill. App.2d 174, 178, 223 N.E.2d 716. These divergent principles are well exemplified by the majority and dissenting opinions of the Justices of the Fifth District of this court in *People v. Lampley*, 1 Ill.App.3d 282, 274 N.E.2d 171.



In the case at bar, we are impelled to approve the sentence because the jury found defendant guilty of murder which includes malice and willfulness and for which this State presently retains even the penalty of death. The State's Attorney recommended a sentence of 50 to 100 years. The conscientious trial judge who had a lengthy and complete opportunity to observe the defendant and to study various technical information pertaining to his personality and background also concluded that this was the proper sentence. The evidence shows here that the defendant fired four shots, one of which struck the victim near the back of the neck and that he attempted to fire additional shots but that the gun was empty. The use of a pistol which defendant brought with him to the scene shows premeditation.

Other contrary factors impel us to reduce the imposed sentence. The information in this record shows that defendant was 24 years of age when the crime was committed. He comes from a very poor and deprived background. He received only a limited education. He has a substantial and good work record with good earnings. He has an unfortunate history of alcoholic indulgence at an early age. A psychiatric report to the trial court credits him with a number of commendable personality traits. In May of 1965, he was convicted of aggravated battery and was admitted to probation for five years with the first nine months in the County Jail considered served. He had virtually completed this long term of probation without any problem at the time of his commission of this crime. When the crime was committed, defendant was concerned about the safety and welfare of his child, with apparent good cause. He and his wife did have a stormy marriage which had deteriorated to the point of separation. Defendant had been placed under a peace bond because of marital arguments. The quarrel with his wife immediately before the shooting,





although not legally sufficient to constitute serious provocation, certainly would provoke defendant and was a factor in his use of violence. He did call the police to surrender. Although some statements that he made to the trial court when sentenced showed an unpleasant degree of truculence, he did at the same time express an admirable concern and affection for his child.

We conclude that we cannot say beyond a reasonable doubt that this defendant is so impervious to the process of rehabilitation that a minimum sentence of 50 years is proper here. Accordingly, sentence is reduced to a term of from 20 to 50 years and the judgment is modified to a sentence of from 20 years to 50 years in the penitentiary. As thus modified, the judgment is affirmed.

Judgment affirmed as modified.

BURKE, J. and LYONS, J. concur.







I.A.<sup>3</sup> 713

56016

SPARKS & COMPANY,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
vs.	)	OF COOK COUNTY.
	)	
CROWN COIN METER COMPANY,	)	
	)	HONORABLE
Defendant-Appellant.	)	RUSSELL DE BOW,
	)	PRESIDING.

ABST.

MR. JUSTICE LYONS delivered the opinion of the court:

This action was brought pursuant to the provisions of the Forcible Entry and Detainer Act (Ill. Rev. Stat. 1969, ch. 57, par. 1, et seq.) for possession of the laundry room areas of seven buildings owned by the plaintiff, which areas are occupied by the defendant. The trial court, sitting without a jury, entered judgment for the plaintiff and defendant has appealed.

Defendant's business includes the installation and maintenance of coin operated laundry room equipment in multi-family residential dwellings. In the years 1968 and 1969, defendant, in pursuit of this enterprise, executed a separate lease for each of the spaces here at issue with plaintiff's predecessor in title. All leases were identical in their terms, consisting of defendant's standard form lease which provided, inter alia, for a lease term of seven years which was to be renewed automatically for an additional term of five years, except upon prior written notice to the lessor by the lessee of his desire that the lease not be extended. The amount of the rental was to be determined by reference to defendant's gross receipts from the machines which were installed in the leased premises.

Appended to these form leases was a rider, drawn by one of the beneficiaries of the trust which was plaintiff's predecessor in title, which provided in pertinent part:

1. In the event of the sale of the above property covered by a laundry room lease, any beneficiary of the trust as it presently exists, their heirs, or their personal representative, exclusive of



assigns, may terminate lease upon 30 days prior written notice, provided however, such written notice shall be accompanied by a check in the sum equal to the pro rata amount of additional consideration paid for each unexpired month of the lease and its first extension thereof.

In 1970, plaintiff purchased the buildings to which the laundry room leases related, the actual closing of the sale taking place on February 9 of that year. Seven letters, one relating to each of the premises leased, were sent to and received by the defendant. Each of these letters, bearing the date February 9, 1970, contained notice of the sale to plaintiff and of termination of the lease effective March 12, 1970, pursuant to the provision of the rider set out above. Each letter was accompanied by a check made payable to the defendant and purported to be in the amount due under the rider as a pro rata rebate for improvements paid for by defendant. The adequacy of the amounts so tendered has never been disputed. The letters were signed by one Joseph B. Bergman, a beneficiary under the trust. By letter dated February 26, 1970, defendant advised Bergman of its refusal of the notices of termination on the ground that the notices were not in compliance with the provisions of the lease. The checks were returned with this letter.

During the month of March 1970, a meeting was held between a Mr. Barowsky of Sparks and Company and Ernest Zakowski, business manager for the defendant. At that meeting plaintiff's desire that defendant depart the premises was asserted. Crown remained in possession and no further action was taken until November of 1970.

Defendant received seven letters from Bergman which purported to supplement the notices of termination of February 9, 1970, reaffirmed the termination and set January 1, 1971, as the date on or before which defendant was to surrender possession. Accompanying each letter was a check made payable to defendant for



the rebate purported to be due defendant in the event of termination. The record does not disclose defendant's treatment of these checks.

On December 1, 1970, plaintiff served defendant with notice that it had elected to terminate the leases and with notice to quit the premises on January 1, 1971.

Defendant contends that the original notices of termination was ineffective in that it did not conform with the provisions of the rider to the lease. The argument is made that the words "30 days prior written notice" appearing in the rider require that the notice of termination must have been given 30 days prior to the sale. Defendant concludes that since the original notice was not given until the date that the sale was closed, the leases remain in full force, unaffected by the notices of February 9, 1970. This argument is without merit. The language of the rider clearly conditions the right of termination upon the sale of the leased premises. Thus no notice given prior to the actual sale, as defendant urges is required, could ever be effective. See *Thomas v. Pullman Trust and Savings Bank*, 1939, 300 Ill. App. 187, 20 N.E.2d 832. We conclude that the notice of February 9, 1970, was in full compliance with the provisions of the rider to the lease and was therefore valid and effective.

Defendant has also presented the alternative argument that even if we should determine, as we have, that the notice of February 9, 1970, was valid, plaintiff's acceptance of rent subsequent to the term of the notice and issuance of a second notice operate as a waiver of the original notice of termination. The cases relied upon in support of this proposition are clearly inapplicable to the present factual situation.

In *Westerman v. Gilmore*, 1958, 17 Ill.App.2d 455, 150 N.E.2d 660, it was held that a notice to quit served on a tenant for failure to pay rent was not effective to terminate the tenant's





leasehold at the time of service, and that the landlord's acceptance of the rent prior to the expiration of the term of the notice waived the tenant's breach upon which the notice was founded. Thus, the notice could not serve as a basis for an action for possession.

In *Hoeftler v. Erickson*, 1947, 331 Ill.App. 577, 73 N.E.2d 448, the trial court's direction of a verdict for the plaintiff landlord in an action for possession was found to be error. Erickson, the tenant, occupied the premises pursuant to a month to month tenancy, with each term commencing on the first and ending on the last day of the calendar month.

Plaintiff served the defendant with a notice of termination of the tenancy, the termination date being set at July 10. Conflicting evidence was introduced concerning the date of service of the notice, plaintiff's evidence tending to establish that it was served on May 31, and defendant's to the effect that it was not served until the afternoon of June 3. The trial of the action resulted in a jury verdict for the defendant. Later a new trial was granted to the plaintiff, but prior to that time he accepted rent for the months of July and August and also served the defendant with a second notice of termination, which stated that defendant's tenancy would terminate on September 30. A second trial was held and the trial court reserved a ruling on plaintiff's motion for a directed verdict. The jury returned a verdict for the defendant and the trial court then allowed plaintiff's motion.

On appeal it was held that the allowance of plaintiff's motion for a directed verdict was error in that there existed for the jury a factual issue with respect to the date of the service of the first notice of termination. Since the landlord could terminate the tenancy only at the end of a term, it was clear that the notice, whenever served, could not terminate the tenancy effective the date specified therein, July 10. Thus the jury's





determination of the date notice was served would resolve the question of whether the first notice was served in time to terminate the tenancy effective June 30, given the statutory requirement of 30 days notice of termination.

The court then opined that even if it were to be assumed that the question of the date of service were to be resolved in favor of the landlord, he would still not be entitled to a judgment for possession. The court reasoned that the second notice recognized the existence of a tenancy which was to expire on September 30, and therefore the prior notice of termination was viewed to have been waived and considered of no effect by the landlord. The court also noted that the landlord's having accepted rents for the months of July and August constituted a waiver of the first notice and recognition of the continuation of the month to month tenancy.

*Satorius v. Boeker*, 1947, 330 Ill.App. 512, 71 N.E.2d 851, was an action for possession of farm land. The tenant occupied the land as a tenant from year to year with each term of the tenancy commencing on March 1. The agreed rent was one half of the proceeds from the sale of crops raised on the land by the tenant. In December 1944, the landlord mailed tenant a notice that his tenancy would terminate on March 1 of the following year. The tenant remained in possession subsequent to that date, and on March 6, 1945, was served with notice for immediate possession.

An action for possession was brought at which it was proved that prior to trial of the action the landlord accepted rent from the defendant for the year 1945-46. The court found that the landlord's acceptance of rent for that year constituted a waiver of the notice of termination and an election to accept a new year to year tenancy.

The present case, unlike the *Hoefler* and *Satorius* cases, does not involve a factual situation in which a new tenancy for a



term similar to the last arises by operation of law upon the performance by the landlord of some act indicative of his acceptance of a new tenancy. Neither is this case factually similar to Westerman, where the acceptance of rent must be viewed as a waiver of the tenant's breach upon which the notice to quit was founded. (Bernstein v. Weinstein, 1920, 220 Ill.App. 292, involved a factual situation analogous to that in Westerman and is therefore distinguishable on the same basis.) Finally, in the present case no act was performed by the plaintiff which can only be viewed as a waiver of the basis for the original notice to terminate. It is clear from the evidence presented below that even the second notice to terminate was based upon plaintiff's reliance upon the terms of the rider to the lease.

With respect to plaintiff's having accepted rent, we note that the cases summarized above and also relied upon by defendant in this portion of his argument are inapposite. In each of the cases wherein it was found that the acceptance of rent by the landlord constituted a waiver, it was also found that the acceptance amounted to an acceptance of a new tenancy upon the same terms as the old. The single exception is the Westerman case, in which it was found that the acceptance of rent prior to the term of the notice amounted to acceptance of the tenant for a new term commencing on the same date that the notice would have terminated the tenancy. The present case does not involve a situation in which a new tenancy can be said to have arisen, nor is the receipt of rent directly contrary to the basis upon which the right to terminate the leaseholds was asserted.

Defendant has also argued that the plaintiff's negotiation of the rental checks constitutes a recognition of its status as a lessee in view of the following notation which appears on each of the checks:

The payee herein acknowledges and warrants to payor, by the endorsement and acceptance of this check, that payee is the owner, lessor or duly authorized agent of the premises shown on the reverse hereof, and



that payee has good and lawful authority to accept and negotiate the within rental check, and that no other individual, firm or corporation has any rights to the funds represented by this rental check, all in accordance with a certain laundry room lease for the premises shown on the reverse hereof wherein payor is the lessee of said laundry room.

We cannot accept defendant's argument. The acknowledgment extends only to plaintiff's ownership of the property and sole entitlement to rentals therefrom. That plaintiff, as the owner of the property, is entitled to receive rent from one who wrongfully holds over at the termination of his leasehold has never been challenged by defendant. Mere reference to the lease, a document which remains in existence even after the leasehold which it conveyed had been terminated, is not a sufficient memorandum to constitute an acknowledgment of defendant's status as lessee.

We also fail to find that either the Hoefler decision or *Dockrill v. Schenk*, 1890, 37 Ill.App. 44, requires us to conclude that plaintiff's issuance of a second notice of termination constituted a waiver of the first. In each of these cases the second notice could only be viewed as an abandonment of the first. In Hoefler this was deemed to be the case since the second notice, by its own terms, recognized a tenancy which arose by operation of law subsequent to the service of the first. In Dockrill, the breach relied upon for issuance of the first notice was not reasserted in the second, although it apparently would have been sufficient grounds to terminate the leasehold. Instead, separate and independent basis for the termination was relied upon in the second notice. As noted above, the evidence presented in the instant case leaves no doubt that the basis for both the first and second notice of termination was the same, the termination clause of the rider. We see no reason, and defendant has suggested none, why a different result should obtain merely because plaintiff, in issuing the second notice, mistakenly believed that the exercise





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of the termination option contained in the rider was not restricted to the beneficiaries of its predecessor in title, their heirs and personal representatives.

Our prior determination that plaintiff should not be deemed to have waived the notice of February 9 disposes of the necessity of discussing defendant's final argument with respect to the creation of a tenancy from year to year. The judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J. and BURKE, J., concur.





56403

6 I.A.<sup>3</sup> 739

PEOPLE OF THE STATE OF ILLINOIS, )

Appellee, )

vs. )

WILLARD HAMBRECK, a/k/a Villard  
Hambrick, )

Appellant. )

APPEAL FROM THE CIRCUIT  
COURT OF COOK COUNTY.

Hon. Frank J. Wilson,  
Presiding.

ABST.

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the  
court:

Willard Hambreck, otherwise known as Villard Hambrick (defendant), was indicted for attempt burglary (Ill.Rev.Stat. 1969, ch.38, par.8-4) and also for unlawful possession of burglary tools (Ill.Rev.Stat. 1969, ch.38, par.19-2). After a bench trial, he was found guilty of both offenses and judgments were accordingly entered. The report of proceedings and the record show that he was sentenced to one to 14 years in the penitentiary for attempt burglary. No sentence appears to have been entered concerning the crime of unlawful possession of burglary tools. Defendant's notice of appeal to this court is directed only to the conviction and sentence for attempt burglary.

We are convinced that the trial court actually intended to and did sentence defendant for attempt burglary only and not for the lesser offense. The penalty for unlawful possession of burglary tools is limited to from one to two years. Ill.Rev. Stat. 1969, ch.38, par.19-2. In addition, as will be apparent from the following factual statement, it would have been our duty to reverse an additional sentence for the lesser offense because both crimes arose from the same course of conduct. See *People v. Blahuta*, \_\_\_\_ Ill.App.2d \_\_\_\_, 264 N.E.2d 819. Compare *People v. Johnson*, 3 Ill.App.3d 19, 21, 278 N.E.2d 837.



Therefore, we consider that defendant is sentenced only to a term of one to 14 years in the penitentiary for attempt burglary.

Defendant's counsel of record has filed a motion supported by a brief requesting leave to withdraw as his attorney pursuant to *Anders v. California*, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967). Written notice of the motion, together with a copy of the brief were served by mail upon the defendant. In addition, on March 23, 1972, this court caused a letter to be mailed to defendant directing his attention to the copies of the petition and brief previously mailed and stating that the court had given him until May 24, 1972 to file any points that he might choose in support of the appeal. No communication has been received by the court from defendant pursuant to this letter. We have examined the briefs submitted by counsel for defendant together with the entire record. The brief suggests that a review of the record indicates that the only basis for appeal would be whether defendant was proved guilty beyond reasonable doubt.

Our own check of the record discloses that the defendant was, in fact, convicted of attempt burglary by evidence beyond all reasonable doubt. The owner of the premises testified that upon returning to his home he noticed pry marks on the front door. He had never given defendant authority to enter his apartment. Two police officers testified that they responded to a call of "burglary in progress." They observed defendant kneeling on one knee with a screwdriver in his hand attempting to pry open the front door of the premises. Defendant testified that he had been directed to these premises in looking for a certain individual. He denied attempting to enter the apartment and denied possession of the screwdriver.



This evidence presents simply an issue of fact for determination by the trial court. The evidence of guilt is beyond reasonable doubt and the explanation of the defendant is not sufficient to raise any doubt of his guilt. We have no authority to disturb the conviction in a situation of this kind. *People v. Catlett*, 48 Ill.2d 56, 64, 268 N.E.2d 378.

The motion of attorney for defendant for leave to withdraw is, therefore, granted and the judgment and sentence for attempt burglary are affirmed.

Judgment affirmed.

BURKE, J. and LYONS, J. concur.





PEOPLE OF THE STATE OF	)	APPEAL FROM
ILLINOIS,	)	
Appellee,	)	CIRCUIT COURT,
	)	
vs.	)	COOK COUNTY.
	)	
DAVID A. CELMER,	)	HON. JOHN J. CROWLEY,
Appellant.)	)	Presiding.

**ABST.**

MR. JUSTICE BURKE delivered the opinion of the court:

Defendant was found guilty at a bench trial of the offense of criminal damage to property and was sentenced to a term of six months in the House of Correction. He appeals.

The Public Defender of Cook County was appointed counsel for defendant on appeal and has filed in this Court a petition for leave to withdraw as appellate counsel. Pursuant to the case of *Anders v. California*, 386 U.S. 738, the Public Defender has also filed a brief in support of his petition, asserting the appeal to be frivolous and without merit.

This Court thereafter notified the defendant of the pending petition, granting him leave to file points in support of the appeal and advising him that if the appeal is found by this Court to be frivolous, the petition would be allowed and the judgment affirmed without further appointment of counsel. The notice to defendant from this Court, mailed to the address testified to by defendant at trial as his residence address, was returned to the Court marked by the Post Office Department, "No such number \* \* \* Addressee unknown."

The petition and brief of the Public Defender state that the only matters which could be raised on appeal relate to the questions of whether the defendant was properly admonished concerning his right to a jury trial, and whether the People made out a *prima facie* case against defendant, in that they failed to



prove that the damage done to the property was done without the consent of the property owner. Examination of the entire record by this Court, as required by the Anders decision, reveals two additional matters which could possibly be raised as error committed below, namely that there was no proof of the value of the property damaged and that the People related to the trial court, at the hearing in aggravation and mitigation, that an indictment for burglary was then pending against the defendant, which had not, as of then, resulted in a conviction. Examination of the record and the law further reveal that none of these questions have merit, and that an appeal based thereon would be frivolous.

It appears from the evidence adduced at trial, comprising seventeen pages of transcript of proceedings, that a private citizen observed the defendant break a plate glass window of a grocery store located in Chicago, which was owned by someone other than the defendant, and remove from inside the window a tray containing cigarettes. The citizen apprehended the defendant and held him until the police arrived. The arresting officer also found a cigarette lighter among the broken glass and cigarettes strewn on the sidewalk near the broken window, the lighter bearing the imprinted initials: "D.A.C."

The defendant denied breaking the store window and stated that he was in the vicinity of the store when someone accosted him, resulting in the broken window. Defendant further testified that he could not recall who accosted him because he was intoxicated at the time.

With regard to the question of the propriety of the defendant's waiver of a jury trial, defendant himself pleaded not guilty to the charge, stated to the court that he wished to be tried by the court



rather than a jury, and further stated that he understood what a jury trial was. It also appears from the record that the defendant had an opportunity to speak to his court appointed counsel prior to making the jury waiver. There was no error in this regard. See *People v. Richardson*, 32 Ill.2d 497, 207 N.E.2d 453.

The People's evidence made out a prima facie case of criminal damage to property. Proof of the value of the grocery store plate glass window was unnecessary inasmuch as this Court may take judicial notice that a plate glass window of a grocery store has monetary value and that the breaking thereof causes some pecuniary loss to its owner. See *People v. Vesley*, 86 Ill.App.2d 283, 229 N.E.2d 886. It was also unnecessary that the People prove that the person who owned the store window did not give the defendant permission to break the window; under the circumstances involved here, a presumption arises that the property owner did not consent to having his property damaged. *People v. May*, 46 Ill.2d 120, 262 N.E.2d 908; *People v. Maertz*, 375 Ill. 478, 32 N.E.2d 169.

Finally, the fact that during the hearing in aggravation and mitigation the prosecuting attorney related to the court that the defendant was under indictment for burglary, of itself, cannot be said to have affected the sentence imposed. The trial court merely asked the prosecuting attorney if the indictment was still pending, to which counsel answered in the affirmative, and it does not appear that the court took that indictment into consideration in imposing the instant sentence upon the defendant. See *People v. Sawyer*, 1 Ill.App.3d 1096, 275 N.E.2d 771.

Defendant denied the charge of criminal damage to property made against him. The trial court, as the finder of fact, determined the credibility of the witnesses and the weight to be given their testi-





56496

mony, and rendered its judgment accordingly.

From all the circumstances disclosed by the record we conclude that the appeal is frivolous and wholly without merit. The Public Defender of Cook County is accordingly granted leave to withdraw as counsel for defendant on appeal. The judgment is affirmed.

PETITION ALLOWED.  
JUDGMENT AFFIRMED.

GOLDBERG, P.J., and LYONS, J., concur.



## UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable MEL ABRAHAMSON, Justice  
Honorable WILLIAM L. GUILD, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

July 28, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal from the
	)	Circuit Court of
WALTER J. MILKE,	)	Mellentry County.
	)	
Defendant-Appellant.	)	

---

MR. JUSTICE ABRAHAMSON delivered the opinion of the court:

Following a jury trial defendant was convicted of burglary and sentenced to the penitentiary for a term of two to five years.

Defendant contends here, in effect, that even though the ownership of the premises where the burglary allegedly occurred was not disputed by him, the court erred in failing (1) to instruct the jury that they must find ownership of the premises as alleged in the indictment, and (2) to include an instruction to the jury defining the term "without authority."

As indicated above ownership of the premises in question was not controverted. In any event, there was adequate proof of ownership of the premises and of defendant's lack of authority to enter or remain in the building. The instruction tendered by the defendant and given to the jury by the court was in the form of Illinois Pattern Instruction IPI--Criminal No. 14.06, Issues in Burglary, including the second proposition that the defendant did so without authority. Defendant tendered that instruction after the



court refused to give another instruction tendered by defendant which included an additional proposition that "Algonquin Lumber and Supply Center, Inc. was the owner of the premises in question." In view of the fact that there was no dispute as to ownership of the premises, the court properly rejected the latter instruction and gave instead the substituted instruction thereupon tendered by defendant in the form of IPI--Criminal No. 14.06. See Ill. Rev. Stat. 1969, ch. 110A, sec. 451.

At the trial two witnesses, a corporate officer and the other the acting manager of the Algonquin Lumber and Supply Center, Inc., testified without objection that the defendant had no authority or consent to enter or remain on the premises. That testimony stood unassailed. "Without authority" is a term which needs no definition or elaboration. Indeed, defendant tendered no instruction attempting a definition of that term. If he had, the court would have been justified in refusing it. (People v. Malmenato, 14 Ill. 2d 52, 61, and Committee Comment concerning IPI--Criminal No. 2.05 recommending that no instruction be given defining the term "reasonable doubt.")

Finally, the defendant contends that the trial court should have sustained his motion to suppress certain evidence which defendant was carrying when he was stopped at 2 a. m. on a deserted street. The evidence consisted of a brown paper bag containing a box in which there was a new Black and Decker drill. In denying that motion the trial court said:

"The car was parked on the street. At the time it was seen by the witness, it was a violation of the Parking Ordinance. The conduct of the officer investigating the





location of the car and the conduct of the officer who was making inquiry of the Defendant was reasonable. Everything that the officer did was, in the Court's opinion, perfectly reasonable in his investigation and, under the circumstances -- in the light of the hour of the night, the parking of the car, the attitude and the demeanor of the description of the Defendant in question -- I think the officer, when he found a screw driver in his pocket, was acting reasonable when he advised him of his rights and put him in custody.

"The mere fact that it developed that the crime was different from the ticket does not affect the situation, and the Court feels that the officer's conduct was reasonable in every particular, and the mere fact that it was the screw driver rather than the drill is not a determining fact of reasonableness. One thing leads to the other and I, therefore, deny the motion"

The court's ruling was entirely proper. People v.

Doss, 44 Ill. 2d 541.

JUDGMENT AFFIRMED.

SEIDENFELD, P. J. and GUILD, J., concur.



State of Illinois )  
Appellate Court ) ss: .  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Acting Presiding Justice  
Honorable MEL ABRAHAMSON, Justice  
Honorable THOMAS J. MORAN, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

July 18, 1972 the Opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND JUDICIAL DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal from the Circuit
	)	Court of the Eighteenth
DORSEY CONNELL,	)	Judicial Circuit, DuPage
	)	County, Illinois.
Defendant-Appellant.	)	

---

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

Appellant was indicted by the DuPage County Grand Jury on July 8, 1969. The indictment alleged theft of property not from the person, valued at less than \$150 and recited a prior conviction of a charge of misdemeanor theft in the Circuit Court of Winnebago County on April 12, 1965. Defendant plead<sup>ed</sup> not guilty and asked for a jury trial and proceeded to trial. The jury was impaneled and the court informed the jury of the nature of the case. The court then proceeded to examine the jurors, at which point the attorney for the defendant in an oral motion asked that the court read the indictment in its entirety. At a hearing out of the presence of the jury, the court denied the defendant's motion as to the reading of that portion of the indictment which alleged the prior conviction of misdemeanor theft. Then the court, before the jury, made the following statement:

"The indictment charges the defendant with the offense of theft.



It charges that he did knowingly obtain unauthorized control over property of Joseph Cools, doing business as the Glen Ellyn Sports and Camera Shop, valued at less than \$150.00, said property being a Kodak movie projector, intending to deprive the owner permanently of the use and benefit of said property."

The jurors were then examined upon their voir dire. Trial was had and at the close of the plaintiff's case, after plaintiff and defendant had both rested and out of the presence of the jury, a certified copy of the record of conviction of misdemeanor theft of one Dorsey Connell on the 16th day of December, 1964, in the Circuit Court of the 17th Judicial District in the County of Winnebago, State of Illinois, was offered into evidence. At this time, the defendant's attorney again objected to the offer and introduction of the certified copy of this alleged prior conviction outside of the presence of the jury. Defendant's attorney argued that since the prior conviction was alleged in the indictment, it was incumbent upon the State to prove the prior conviction of this defendant beyond all reasonable doubt. The court again overruled the defendant's motion and received the certified copy in evidence. Defendant's attorney moved for a directed verdict at the close of the evidence, which was denied. Closing arguments were held and the jury returned a verdict finding the defendant guilty of theft of property not from the person, valued at less than \$150. The court then sentenced the defendant to serve not less than three nor more than five years in the State Penitentiary, pursuant to the enhanced penalties of the Illinois theft statute (Ill. Rev. Stat. 1967, ch. 38, sec. 16-1(a)(1)).

The sole issue in this case is whether or not for the purposes of obtaining an enhanced penalty as provided for in the above statute, the State must allege and prove beyond a reasonable doubt, the defendant's





prior conviction. The State contends that a mere introduction of a certified record of a prior theft conviction is sufficient to prove the defendant's prior conviction since the enhanced penalty provision of the statute is analagous to a hearing in mitigation and aggravation, and does not require the same degree of proof as the State is put to in the trial of the substantive offense charged. Appellant contends that the defendant is clothed with the presumption of innocence of the prior conviction just as he is clothed with a presumption of innocence in the principal offense and, therefore, the State must prove the prior conviction beyond a reasonable doubt. Neither the State or the appellant disagree with the manner in which the trial court received proof of the alleged prior conviction of this defendant. Therefore, this is not an issue. Nor is the appellant questioning the fact of the variance between the date of the prior offense as alleged in the indictment and the actual date of the offense as shown on the certified copy of the prior conviction.

Appellant contends that a prior offense must be alleged in the indictment and proven beyond a reasonable doubt to provide the basis for raising a misdemeanor to a felony and in support thereof, cites the cases of The People v. Ostrand, 35 Ill. 2d 520, 221 N.E. 2d 499, and The People v. Dixon, 46 Ill. 2d 502, 263 N.E. 2d 876. The Ostrand case dealt with the conviction of the defendant under the Habitual Criminal Act which required, by statute, the allegation of a prior conviction in the indictment plus proof of the prior conviction beyond a reasonable doubt. The Dixon case involved a defendant who had been convicted of unlawful use of weapons within five (5) years of being released from the penitentiary after a prior felony conviction. In that particular case, there was an enhancement of the penalty where it could be shown that the accused had been convicted



of a prior felony within five years of the conviction for unlawful use of weapons. In the case of The People v. Jabine, 324 Ill. 55, the Supreme Court indicated that an indictment must recite the prior conviction and the State must prove the prior conviction beyond a reasonable doubt. The Jabine case dealt with a subsequent violation of the Prohibition Act where the fact of a prior conviction aggravated the crime and made the punishment more severe. The court, at page 58, stated: "...where the prosecution is for a second offense, and in order to sustain a conviction for the second offense, the prior conviction must be established by proper evidence."

The Fifth Appellate District in 1967 decided a case which is strikingly similar to the one presently before the court. In People v. Kurtz, 89 Ill. App. 2d 171, the court relied heavily upon People v. Casey, 399 Ill. 374, 77 N.E. 2d 812, and People v. Stewart, 23 Ill. 2d 161, 177 N.E. 2d 237. In the Kurtz case, the defendant had been charged with theft of property not exceeding \$150 in value and the court, over objection, admitted into evidence what purported to be an authenticated copy of a record of an alleged conviction of the defendant in the State of Alabama. On appeal, the defendant successfully contended that there was no evidence which proved that the defendant was the same person who had been previously convicted and therefore, he should not be subject to the enhanced penalty provision of the Illinois theft statute. In that case, as in this one, the State alleged that the rules of evidence should be relaxed as they are in a hearing in aggravation and mitigation. The court cited the Casey and Stewart cases and at page 173 made the following observation:

"The situation here presented is clearly distinguishable from a hearing in aggravation and mitigation conducted in compliance with section 1-7 (g) of the Criminal Code (c 38, sec 1-7 (g), Ill Rev Stats 1965). The hearing conducted



under section 1-7 (g) is to determine what punishment, within a permissible range, should be imposed. Here the result of the hearing determines whether the offense is a felony or a misdemeanor. (Sections 2-7, 2-11, and 16-1 of the Criminal Code of 1961.)

Aside from the difference in the punishment which may be imposed, the far reaching effects of conviction of a felony, as distinguished from conviction of a misdemeanor, are so clearly apparent as to require no further discussion."

In People v. Hornstein, 47 Ill. App. 2d 367, 198 N.E. 2d 207, defendants were charged with certain acts of gambling. There was a multi-count indictment returned against the defendants which charged, among other things, that they were second offenders which would subject them to an enhanced penalty as in the case presently before this court. The Appellate Court there found that the State had not established beyond a reasonable doubt that the persons named in the certified copy of the conviction were the same persons as the defendants. As a result thereof, the case was reversed and remanded. The court based its decision upon The People v. Casey, supra, where it was stated at pages 379 and 380:

"It will be observed that the statute gives the authenticated copy of the record of conviction prima facie effect as evidence, but there is the further question as to the defendant being identified as the person previously convicted. . . . . In a prosecution under the Habitual Criminal Act, the defendant is clothed with the presumption of innocence and, as has been pointed out, this applies to the fact of his former conviction which, if proved, enhances the penalty. The mere proof of a record containing identity of name with that of the defendant on trial is not sufficient to overcome the presumption of innocence where the enhancement of the penalty depends upon the proof of such fact. (emphasis added.)

To support the State's contention that the degree of proof required to show a prior conviction need be less than beyond a reasonable doubt, it cites People v. Kelly, 66 Ill. App. 2d 204, 214 N.E. 2d 290. That case did <sup>primarily</sup> not deal with the matter of enhanced penalty but dealt with the question of





whether or not the State had proven the value of the property allegedly stolen by the defendant. The other case cited by the State, The People v. Atkinson, 376 Ill. 623, 35 N.E. 2d 58, was brought under the Habitual Criminal Act and the defendant on appeal complained that a conviction of the offense of larceny of an automobile was not one of the included offenses under the Habitual Criminal Act. The court found that the defendant's sentence was improper and the case was reversed and remanded, with directions. The Atkinson case is distinguishable from the case before this Court.

It is apparent that in this State, the fact of the similarity between the defendant's name and the name appearing on a certified copy of conviction, is not sufficient proof of a prior conviction as is required for the imposition of an enhanced penalty. As there is no evidence to identify this defendant as the same person who was named in the certified copy of conviction, the trial court erred in imposing the enhanced penalty.

For the reasons set forth, the judgment is reversed and remanded to the trial court with directions to vacate the sentence imposed, and to impose a sentence in accordance with the provisions applicable to a first conviction of theft of property not from the person, and not exceeding \$150 in value.

REVERSED AND REMANDED WITH  
DIRECTIONS.

MORAN and GUILD, J.J., Concur.





55603



6 I.A.<sup>3</sup> 792

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
v. )  
 )  
BEN ELLIS, )  
 )  
Defendant-Appellant. )

Appeal from the Circuit  
Court of Cook County.

**ABST.**

Francis W. Glowacki, M.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

Jeffrey Alper filed a complaint charging Ben Ellis with the offense of battery. Ill.Rev.Stat., 1969, ch. 38, para. 12-3(a). Ellis waived a jury trial, was found guilty and fined \$100.

Ellis raises these points on appeal: he was not found guilty beyond a reasonable doubt; he did not receive a fair trial because of the lack of time for preparation and the incompetency of his counsel, and he should have been granted another trial because of newly discovered evidence.

Ellis has filed neither an abstract nor excerpts (Ill. Rev.Stat., 1969, ch. 110A, para. 342). A party prosecuting an appeal has the duty to present an abstract of the record or excerpts from the record adequately detailing the errors relied upon for reversal. Either one must contain all the material which a reviewing court will require for a complete consideration of the issues raised on appeal. The appellant's failure to file either of these essential pleadings warrants the dismissal of his



appeal. Davis v. Davis, 128 Ill.App.2d 427, 262 N.E.2d 788 (1970). However, without establishing a precedent, we will consider this case on its merits only because of the simplicity of the issues and the brevity of the record.

The alleged battery took place after an automobile accident between the complainant and the defendant. Both men got out of their cars. According to Alper, Ellis ran over to him, called him names, struck him in the face and continued to harass him until restrained by a policeman from the Village of Skokie. Alper told the officer, "He wanted to get me. He wanted to kill me." Alper was taken to a hospital. Five stitches were required to close the wound in his upper lip. The complaint was filed four days later.

The accident had occurred in Lincolnwood and a policeman from that village came to the scene. He spoke to the Skokie officer and then to Ellis who said that Alper rushed at him in a threatening manner and he had to defend himself.

At the trial Ellis gave a different version of the events following the accident. He said he approached the dazed Alper and asked, "Why did you try to jump me?" He testified that Alper did not accuse him of a battery and that he did not notice that Alper was injured. He denied threatening or striking Alper.



Ellis' argument that he was not proven guilty beyond a reasonable doubt is predicated upon Alper's credibility. He asserts that Alper's testimony about the battery should not be believed because of inconsistencies in his testimony and the impossibility of the accident having occurred in the manner he described. The remarks which can be deemed inconsistent were minor in character. Although Ellis' version of the accident seems more plausible than Alper's, Alper's account of the battery was more convincing than Ellis'. Furthermore, Alper's testimony in this regard was supported by his cut lip and by the inference which can be drawn from Ellis' explanation to the Lincolnwood officer that he was forced to defend himself. It is the function of the trial court to determine the credibility of the witnesses and the weight to be afforded their testimony, and where the evidence is merely conflicting, a reviewing court will not substitute its judgment for that of the trier of fact. People v. Woods, Ill.App. , 268 N.E.2d 246 (1971).

The defendant complains about the "hurried atmosphere" of the trial and the lack of preparation of his counsel. When the case was called at 11:00 A.M., Ellis stated his attorney was not present; he was informed that the case would proceed if the attorney was not present by 11:30. Ellis responded, "He said that if he was not here by 12:00 to ask for a continuance." Upon the second call at 12:00, the court was informed by someone not identified in



the record that the defendant's attorney was before another tribunal. The court answered, "All right, I will make it a final continuance." At that time, the defendant's counsel appeared and asked for five minutes' delay.

In the absence of a request for a continuance, the presumption was that the defendant and his counsel were ready and desired an immediate trial. People v. Jones, 9 Ill.2d 481, 138 N.E.2d 522 (1956). It was not the court's duty to order a continuance on its own motion after the defendant conferred with his counsel who, in turn, announced he was ready for trial. People v. Coleman, 45 Ill.2d 466, 259 N.E.2d 269 (1970).

The defendant's next contention relates to the incompetency of his counsel. It is based upon the following allegations which supposedly amount to inadequate representation: the cross-examination of the complainant was so minimal as to be valueless; his counsel didn't explore the fact that the complaint was signed four days after the accident by Alper's father; five minutes' time was inadequate to prepare a defense; the inconsistencies in the testimony of the officer were not brought out, and there was reason to believe Alper falsified his testimony in order to avoid revocation of his driving privileges. After reviewing the record, we note that the defense counsel stressed the implausibility of the accident, referred to the date of the complaint and was presented with no inconsistencies in the testimony of the officer.





The remaining factors were merely matters of judgment or trial strategy and do not amount to incompetency. See People v. Somerville, 42 Ill.2d 1, 245 N.E.2d 461 (1969); People v. Green, 36 Ill.2d 349, 223 N.E.2d 101 (1967).

The defendant contends that a second trial should be granted because of newly discovered evidence. He asserts that the court should have the advantage of the testimony of the police officer from Skokie who was the first officer on the scene, and that of Joseph Medjes, who was a passenger in his auto at the time of the accident. Applications for a new trial on the ground of newly discovered evidence are subject to the closest scrutiny; the burden is upon the applicant to rebut the presumption that the verdict is correct and to show that he has not been wanting in diligence in discovering the evidence. The decision is within the discretion of the trial judge, whose denial of a new trial will not be disturbed except in case of manifest abuse. People v. Holtzman, 1 Ill.2d 562, 116 N.E.2d 338 (1953). The criteria to be applied by the court are these: the newly discovered evidence must appear to be of such conclusive character that it will probably change the result if a new trial were granted; it must have been discovered since trial; be such that it couldn't have been discovered by the exercise of due diligence before trial; be material to the issue, and yield proof not merely cumulative to the evidence on trial. People v.



Brown, 125 Ill.App.2d 336, 261 N.E.2d 11 (1970); People v. Pranno, 82 Ill.App.2d 364, 227 N.E.2d 95 (1967).

The evidence was not newly discovered. The Skokie officer talked to Ellis immediately after the accident; Medjes witnessed the accident and was an old friend of Ellis. His proffered testimony was known to Ellis before the trial. The failure to call these witnesses cannot be excused because one lived out of the State or because Ellis felt confident of acquittal and thought their testimony was unnecessary. The trial judge ruled correctly in rejecting the mislabeled "newly discovered evidence" and in denying the motion for a new trial.

The defendant's conviction for the offense of battery is affirmed.

Affirmed.

McGlooin, P.J., and McNamara, J., concur.





I.A.<sup>3</sup> 799

55797

THE COUNTY OF COOK, a body politic	)	
and corporate,	)	APPEAL FROM
Plaintiff-Appellee,	)	
	)	CIRCUIT COURT,
vs.	)	
	)	COOK COUNTY. <b>ABST.</b>
JOSEPH P. HOUGH and GLADYS HOUGH,	)	
Defendants-Appellants,	)	
	)	HONORABLE NATHAN M. COHEN,
and	)	Presiding.
	)	
HARRY KROLL, as Trustee under Trust	)	
No. 100, MILROY R. BLOWITZ, RIDGEWAY	)	
HOSPITAL, FRANK SALVESEN, d/b/a	)	
SALVESEN BUILDERS, CHICAGO TITLE AND	)	
TRUST COMPANY, under Trust No. 53091,	)	
MIDWEST BANK AND TRUST, SOUTH EAST	)	
NATIONAL BANK, STANDARD ACCEPTANCE AND	)	
EXCHANGE NATIONAL BANK, as Trustee	)	
under Trust No. 20109,	)	
Defendants.	)	

MR. JUSTICE BURKE delivered the opinion of the court:

Appeal is taken from a decree granting a permanent injunction, commanding the demolition of all building structures existing upon the property of Joseph P. and Gladys Hough and imposing a fine of \$10,000 upon them, and also from an order denying the Houghs' petition for the vacation of that decree and for other relief, filed pursuant to Section 72 of the Civil Practice Act. (Ill.Rev.Stat. 1971, Chap. 110, Para.72.)

It appears from the record that Joseph P. and Gladys Hough (hereinafter "defendants") are the owners of an eight acre parcel of real estate located in the northwest portion of Cook County, and that in January 1956 they secured a permit from the Building and Zoning Bureau of Cook County for the erection of a barn and a stable upon the premises. It further appears from the pleadings in the record that additional structures have been erected upon the property since that time.

In September 1969 the County of Cook filed the instant



amended complaint against the defendants and others, seeking a temporary injunction and a permanent injunction to restrain defendants from constructing new buildings upon the property, and to require them to conform all existing structures to the county zoning and building codes, or, in the alternative, to require vacation of all structures found not to be in compliance with the said codes. Defendants thereafter filed an amended answer and additional affirmative defenses, to which it appears no reply has been filed by the County.

On November 13, 1969 a temporary restraining order was issued by the court with the consent of the parties hereto. The order provided in part that the defendants initiate, within five days from the date of the order, all steps necessary to secure a re-zoning of the property which would permit certain specified uses to be conducted upon the property; that a fine of \$10,000 be entered against the defendants in the event re-zoning was secured and the work to correct the existing code violations was not under way within 45 days from the date the re-zoning was granted, but no later than September 30, 1970; that in the event the re-zoning was secured and the work to correct the code violations did commence within the time specified, a fine of \$5,000 should be entered against them; and that in the event no re-zoning was secured on or before September 30, 1970, a permanent injunction should issue and the \$10,000 fine be entered forthwith.

The temporary injunction order further provided:

"\* \* \* The consent to this Decree by the County of Cook, Plaintiff, and by Joseph Hough and Gladys Hough, Defendants, and the entry of this Decree by this Court shall not be construed as an admission, waiver of any charge, allegation, or any defense or right of either of the said Plaintiff or the said Defendants whether the same shall have existed or have been asserted prior to the entry of this Decree or shall arise or occur after the entry of this Decree.





"\* \* \* It is further Ordered, Adjudged and Decreed that this Court retain jurisdiction for such other relief for the plaintiff and the defendant Hough, as the case may be, as the Court may deem necessary until such time as the Court can hear evidence and determine whether or not a Permanent Injunction should issue."

The defendants were represented by counsel at the time the consent injunction order was entered, but on November 12, 1970 their counsel were granted leave of court to withdraw from the case. The following day those counsel sent to the defendants, by certified mail, return receipt requested, a notice of motion received from the County that the County was to appear in court on November 18, 1970 and request the issuance of a permanent injunction in this matter. It appears from the return on the certified mail receipt, that the notice of motion was not delivered to the defendants until November 20, 1970.

On November 18, 1970 the County appeared before the court and requested the issuance of a permanent injunction, at which time counsel for one of the parties named as defendant below, other than the Houghs, represented to the court that Mr. Hough was in the hospital preparing to undergo heart surgery and that no one was in court on the Houghs' behalf. Without hearing evidence the trial court issued the permanent injunction, ordering the demolition of all building structures on the property and entering the fine of \$10,000. The decree of permanent injunction was signed by the trial judge on November 19, 1970 and is stamp-dated, November 20, 1970.

On December 18, 1970 new counsel appeared for the defendants and filed a motion to vacate the permanent injunction, which motion was denied on January 13, 1971. On February 17, 1971 the County filed against the defendants a petition for rule to show cause, which the defendants answered. With their answer they also filed a petition



for the vacation of the decree of permanent injunction and for other relief, pursuant to Section 72 of the Civil Practice Act. The Section 72 petition was subsequently denied.

The Houghs have appealed from both the decree of permanent injunction and the order denying the relief requested in the Section 72 petition. (See Johnson v. Thomas, 75 Ill.App.2d 407, 221 N.E.2d 44.)

Demolition of property is a drastic remedy and is limited to the necessities of the particular case; for that reason evidence must be taken to determine whether demolition is absolutely necessary. See City of Aurora v. Meyer, 38 Ill.2d 131, 230 N.E.2d 200.

The transcript of proceedings taken at the hearing on the County's motion for the issuance of the permanent injunction held on November 18, 1970, shows that no evidence was taken as to the condition of the structures ordered demolished, as to the structures' compliance or non-compliance with the county building and zoning codes, nor as to the defendants' compliance or non-compliance with the terms of the temporary injunction. The decree of permanent injunction further specifically recites that the cause "coming on to be heard on the motion of the plaintiff for a permanent injunction against the defendants, JOSEPH P. HOUGH and GLADYS HOUGH, and the Court having considered the pleadings filed herein and recommendations of counsel, hereby find (sic) as follows: \* \* \*." (Emphasis supplied.) Further, the temporary injunction, which may have been rendered inoperative due to the unusual provision therein relating to the complete reservation of rights by all parties thereto, contemplated the taking of evidence before a permanent injunction issued. It was reversible error to have issued the permanent injunction without first having taken evidence in the matter.



The cases cited by the County in support of the demolition order of the decree are distinguishable from the case at bar, in that they involved trials wherein extensive evidence was taken by the court. Such is not the situation in the case at bar. See Village of Lake Bluff v. Horne, 24 Ill.App.2d 343, 164 N.E.2d 217; The County of DuPage v. Henderson, 402 Ill. 179, 83 N.E.2d 720.

Defendants also raise the contention that the decree of permanent injunction is void for failure of the County to join a "necessary party." In the event there is a re-trial of this matter, we believe that this question will not arise again.

For these reasons the November 20, 1970 decree of permanent injunction and the February 23, 1971 order denying relief under Section 72 of the Civil Practice Act are reversed, and the cause is remanded with directions to proceed in a manner not inconsistent with the views expressed herein.

DECREE AND ORDER REVERSED AND  
CAUSE REMANDED WITH DIRECTIONS.

GOLDBERG, P.J., and LYONS, J., concur.



1 6 I.A.<sup>3</sup> 836

VILLAGE OF BEDFORD PARK, ) APPEAL FROM  
 Plaintiff-Appellee, )  
 ) CIRCUIT COURT,  
 vs. )  
 ) COOK COUNTY.  
 JOSEPH G. LEISURE, )  
 Defendant-Appellant.) HON. ADAM N. STILLO,  
 Presiding.

ABST

MR. JUSTICE BURKE delivered the opinion of the court:

Joseph G. Leisure was charged with driving while intoxicated in violation of a Village of Bedford Park ordinance. In a bench trial, he was found guilty as charged and fined \$200 plus costs.

On August 31, 1970 defendant was operating a motor vehicle on State Road in the Village of Bedford Park. Officer James Mikolaitis of the village police testified that at 1:10 A.M. he observed defendant driving an automobile at a speed of 70 m.p.h. in a 35 m.p.h. zone. A chase ensued and the defendant stopped two miles from where the officer first observed him. The defendant alighted from his automobile and walked toward the officer's squad car. Mikolaitis testified that the defendant's walk was wobbly and that he had to hold on to the vehicles for support. This witness further testified that he noticed a heavy odor of alcohol on the defendant's breath and that when asked who was in the car with him, the defendant replied: "my family - and if I didn't have them with me, you'd never caught me."

The defendant on arrival at the police station submitted to a number of tests. When asked to walk a straight line, he stumbled, swayed and required support. He was hesitant on the finger to nose test, slow and fumbling when picking up coins, and in turning he staggered and swayed. His speech was slurred. When asked if he had anything to drink, the defendant said he had four beers earlier that evening. He stated that he was not taking any tranquilizers,





pills, or other medicines. The breathalyzer test disclosed the defendant's blood alcohol content to be .20 per cent. Mikolaitis testified that in his opinion the effects of the alcohol upon the defendant were extreme and that he was unfit to drive a motor vehicle. Officer Mikolaitis is licensed by the Illinois Department of Public Health as a breath analysis machine operator and followed the standard procedures in giving the test. The machine used had been certified in July 1970. The village ordinance states that if there is 0.10 per cent or more by weight of alcohol in the blood there shall be a presumption that the person is under the influence of intoxicants. Defendant testified that he had not been drinking that evening; that he cooperated with the police and that he had a bad right leg which was one-fourth inch shorter than the left. He stated that he walked with a limp and was taking pills to relieve the pain. The defendant further stated that his children and wife were with him that evening and that his wife would not have allowed him to drive if he had been drinking. Mrs. Leisure's testimony corroborated that of her husband.

The defendant contends that he was not proved guilty beyond a reasonable doubt. We do not agree.

Officer Mikolaitis testified to facts which support the finding that defendant was intoxicated at the time he was driving his automobile. *People v. Casa*, 113 Ill.App.2d 1, 251 N.E.2d 290. The fact that Mikolaitis did not testify that the breathalyzer test was by weight of alcohol is not dispositive. The trial court, in the absence of evidence to the contrary, could reasonably assume that the words "per cent blood alcohol," were based upon the statutory requirement of weight. *People v. Krueger*, 99 Ill.App.2d 431, 241 N.E.2d 707.

The issue of the defendant's guilt presents a question of credibility. It is the function of the trial judge, sitting with-



out a jury, to determine the weight to be accorded the testimony of the witnesses. The findings of the court in that regard will not be disturbed on review unless they are so improbable or unsatisfactory as to leave a reasonable doubt as to the defendant's guilt. People v. Catlett, 48 Ill.2d 56, 268 N.E.2d 378. A careful consideration of the record convinces us that the findings of the trial court should not be disturbed.

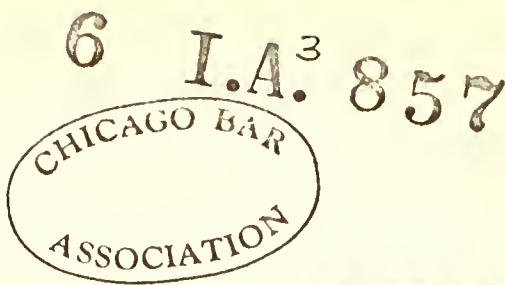
For the reasons stated the judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J., and LYONS, J., concur.



56654



ABST.

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.	)	
	)	
TRAVIS RANDOLPH,	)	Hon. Joseph A. Power,
	)	Presiding.
Appellant.	)	

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

Travis Randolph (defendant), was indicted for robbery (Ill.Rev.Stat. 1969, ch.38, par.18-1) and also for aggravated battery (Ill.Rev.Stat. 1969, ch.38, par.12-4). Upon his plea of guilty, on July 26, 1966, he was found guilty of both offenses and judgments were accordingly entered. He was admitted to probation for three years with the first ten months to be served in the County Jail. On May 31, 1967, his probation was extended two years, to July 26, 1971. Thereafter, on April 7, 1970, he was convicted of robbery as charged in another indictment (Case No. 70-380). On April 7, 1971, the trial court revoked his probation and sentenced him to one to five years in the penitentiary; consecutive after termination of his previous conviction in Case No. 70-380.

On his appeal to this court, his counsel of record has filed a motion supported by a brief requesting leave to withdraw as his attorney pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed.2d 493, 87 S.Ct. 1396(1967). Written notice of the motion, and also a copy of the brief, were served by mail upon the defendant. In addition, on May 3, 1972, this court caused a letter to be mailed to defendant directing his attention to the copies of the petition and brief previously mailed and stating that the



court had given him until July 5, 1972 to file any points that he might choose in support of the appeal. No communication has been received by the court from defendant pursuant to this letter. We have examined the brief submitted by counsel for defendant together with the entire record. The brief suggests that a review of the record indicates that the only basis for appeal would be whether procedural rules of due process were observed in the revocation of probation and imposition of sentence. The conclusion was reached that defendant did receive due process of law.

Our own examination of the record discloses that this conclusion is correct. Defendant received a full hearing and a conscientious judicial determination that his probation conditions had been violated. Defendant was fully advised and had a fair opportunity to defend against the alleged violations. See *People v. Morici*, 129 Ill.App.2d 248, 263 N.E.2d 142. See also *People v. Dotson*, 111 Ill.App.2d 306, 310, 250 N.E.2d 174.

The motion of attorney for defendant for leave to withdraw is therefore granted and the judgment and sentence are affirmed.

Judgment affirmed.

BURKE, J. and LYONS, J. concur.





PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
vs.	)	COOK COUNTY
	)	
LARRY D. HAYES,	)	HON. LOUIS B. GARIPPO,
	)	JUDGE PRESIDING.
Defendant-Appellant.	)	

**ABST.**

MR. JUSTICE BURMAN delivered the opinion of the court.

The defendant, Larry D. Hayes, was found guilty of armed robbery in a bench trial. He was sentenced to three years probation with the first 90 days in the County Jail considered served.

The defendant filed a notice of appeal and the Public Defender was appointed as his counsel. On March 28, 1972, the Public Defender filed a motion, after serving the defendant with a copy, for leave to withdraw as counsel for defendant on the ground that an appeal would be without merit.

In support thereof, and pursuant to the ruling in Anders v. California, 386 U.S. 738, he attached a brief in which he concluded from a review of the record and a report of the proceedings that the only bases for an appeal would be:

1. That the in-court identifications of the defendant by the four occurrence witnesses were the tainted products of photographic identification and lineup procedures which were so impermissibly suggestive as to lead to a substantial likelihood of irreparable misidentification.
2. That the lineup and courtroom identifications were the fruits of an arrest made without probable cause and should have been suppressed.



The record reveals that on December 21, 1970, Sandra Harris, Michelle Smith, Nicki and Valerie Anderson were walking in the vicinity of 63rd and Halsted in Chicago after a shopping trip. Three young men ran up to them from behind. Defendant ran past the complaining witnesses, Miss Harris and Miss Smith, with a gun and announced a robbery. Defendant grabbed Nicki Anderson's coat, unbuttoning it with one hand, and removed it from her person. He was face to face with Miss Anderson at this time. Valerie Anderson was standing next to Nicki. Defendant told the other two boys to take the packages from the girls. The offenders then fled. The crime took about two or three minutes.

The defendant was arrested for armed robbery after being identified by each of the four eyewitnesses individually from a group of five to seven police photographs. At the time of the photographic viewings, on December 27, 1970, the defendant was in custody on another charge. He was subsequently released. On January 13, 1971, both complaining witnesses identified the defendant in a lineup with five other Negro males at the police station. Defendant's attorney was present at the lineup. Each complainant viewed the lineup alone. At the trial, all four occurrence witnesses identified the defendant as one of the perpetrators of the crime.

In People v. Holiday, 47 Ill. 2d 300, 307, 265 N.E.2d 634, 637, it was held that photographic identification procedures ought not to be employed when the suspect is in custody and a lineup is otherwise feasible. Whether due process has been denied, however, as a result of pre-trial identification procedures depends upon the totality of the circumstances surrounding the identifications. Stovall v. Denno, 388 U.S. 293. Here, each of the witnesses identified the defendant separately from a group of five to seven photographs. The complaining witnesses



identified defendant after a proper six-man lineup at which defendant's counsel was present. Moreover, the record is clear that all four witnesses had ample opportunity to observe defendant at the time of the offense. Thus even if the photographic and lineup procedures were impermissibly suggestive, the witnesses had adequate bases for their subsequent in-court identifications totally independent and apart from the pre-trial identification procedures. People v. Fox, 48 Ill.2d 239, 269 N.E.2d 720. We conclude that under the totality of the circumstances, the in-court identifications were not the products of pre-trial procedures which were so unnecessarily suggestive as to lead to a substantial likelihood of irreparable misidentification.

The Public Defender also raises the question of whether the lineup and courtroom identifications were the fruits of an arrest made without probable cause and should have been suppressed. Defendant was arrested after all four eyewitnesses to the crime had identified him from a group of several photographs. The two complaining witnesses testified they did not wish to sign a warrant until they had seen defendant in person. In People v. Peak, 29 Ill.2d 343, 194 N.E.2d 322, 325, the Supreme Court stated that,

Probable cause for arrest exists when the facts and circumstances within the arresting officer's knowledge, and of which he had reasonable and trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in believing that an offense has been committed, and that the person arrested is guilty.



Here, it is indisputable that an offense had been committed. Moreover, the officer knew that all four witnesses had identified defendant's photograph. Under these circumstances, the officer had reasonable grounds to believe that defendant had committed the offense.

The defendant was notified by this court of the Public Defender's motion for leave to withdraw as his counsel and copies of his motion and brief were attached. Defendant was informed that he had until June 9, 1972, to file any points he might have in support of his appeal, and that after that date we would make a full examination of the proceedings and decide whether to grant the Public Defender's request and affirm the judgment without further appointment of counsel.

We have made a complete examination of all of the proceedings in accordance with the requirements of Anders v. California, 386 U.S. 738, and have concluded there is no merit to this appeal. The Public Defender's request for leave to withdraw as counsel for defendant is therefore granted and the judgment of conviction is affirmed.

AFFIRMED.

DIERINGER, P. J., and

ADESKO, J., concur.

(Abstract only)





56805

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

WILLIAM SCOTT,

Defendant-Appellant.



1, 6 I.A. 906

) APPEAL FROM THE  
) CIRCUIT COURT OF  
) COOK COUNTY

) HON. JOHN J. CROWLEY,  
) JUDGE PRESIDING.

MR. JUSTICE BURMAN delivered the opinion of the court.

ABST

The defendant, William Scott, was found guilty in a bench trial of battery in violation of ch. 38, Ill. Rev. Stat. 1969, par. 12-3, and sentenced to serve six months in the House of Correction.

Defendant filed a notice of appeal and the Public Defender was appointed as his counsel. On April 3, 1972, the Public Defender filed a motion, after serving defendant with a copy, for leave to withdraw as counsel for the defendant on the ground that an appeal would be without merit.

In support thereof, and pursuant to the ruling in Anders v. California, 386 U.S.738, he attached a brief in which he concluded from a review of the record and a report of the proceedings that the only basis for an appeal would be that the defendant was not proven guilty beyond a reasonable doubt.

At trial, Sharetta Martin, the complaining witness, testified that on August 29, 1971, she was in the vicinity of 2800 West Harrison Street with some friends. They were walking along the street when she was hit in the thigh, hand and arm by some buckshot. She looked across the street and saw the defendant with a shotgun in his hand. Jewel Phillips testified for the State and essentially corroborated the complainant's



testimony.

The defendant testified in his own behalf. He stated that he was in the vicinity of the shooting, but denied having a shotgun or shooting the complainant. He said he heard shots and ran.

It is apparent that the trial judge believed the testimony of the State's witnesses and disbelieved that of the defendant. The credibility of witnesses is a matter for the trier of fact and a conviction will not be reversed merely because the complaining witness was contradicted by the accused. People v. Reynolds, Ill. App. 2d , 268 N.E.2d 545, 547. This court will not substitute its judgment for that of the trier of facts unless the evidence is so improbable and unsatisfactory as to raise a reasonable doubt as to defendant's guilt. People v. Novotny, 41 Ill. 2d 401, 244 N.E.2d 182, 188. Having made a careful review of the record, we cannot say that this is such a case.

The defendant was notified by this court of the Public Defender's motion for leave to withdraw as his counsel and copies of his motion and brief were attached. Defendant was informed that he had until June 9, 1972, to file any points he might have in support of his appeal, and that after that date we would make a full examination of the proceedings and decide whether to grant the Public Defender's request and affirm the judgment without further appointment of counsel.

We have made a complete examination of all of the proceedings in accordance with the requirements of Anders v.



California, 386 U.S. 738, and have concluded there is no merit to this appeal. The Public Defender's request for leave to withdraw as counsel for defendant is therefore granted and the judgment of conviction is affirmed.

AFFIRMED.

DIERINGER, P. J., and

ADESKO, J., concur.

(Abstract only)





55977

I.A.<sup>3</sup> 931

BUSINESS MEN'S CLEARING HOUSE-Old )  
Orchard, a Division of Business )  
Personnel, Inc., an Illinois )  
corporation, )

Plaintiff-Appellant, )

vs. )

WELLCO CHEMICAL COMPANY, an )  
Illinois corporation, )

Defendant-Appellee. )

APPEAL FROM THE  
CIRCUIT COURT  
OF COOK COUNTY.

HONORABLE  
CHESTER STRZALKA,  
PRESIDING.

ABST.

MR. JUSTICE LYONS delivered the opinion of the court:

Plaintiff, an employment placement agency, sued in contract to recover a fee of \$2400 allegedly due from defendant. Following a bench trial, judgment was entered in favor of defendant. Plaintiff has appealed and presents two issues for consideration by this court:

- 1) whether the court erred by excluding certain evidence offered by plaintiff; and
- 2) whether the verdict entered was against the manifest weight of the evidence.

At trial, George Apostolopoulos testified that he was a private consultant employed by plaintiff. On October 31, 1968, he received a telephone call from Glenn Wellman, owner of the Wellco Chemical Company. According to Apostolopoulos:

[Wellman] said that he was looking for a mechanical engineer to be his manufacturing manager. He had a cleaning equipment manufacturing company. It was a small company. It was in existence a year and a half. They had done \$125,000 worth of business the year before \* \* \*. He was looking for a young mechanical engineer to take over the manufacturing operation of the company, a cleaning type equipment operation, and would be doing a certain amount of travel to the customer sites and do some modification of the equipment. I proceeded to ask \* \* \* what type of salary he was referring to as far as the position he had available. He said the money was no problem. I presented a man I had at the time \* \* \* [but] he was not satisfied with the gentleman's background.

I said, 'Mr. Wellman, if you hire an individual at over \$6,000 a year the fee is ten percent of the first year's income. Depending on what the initial starting salary is, you get an unconditional thirty day refund





guarantee if the net is paid in seven days. If you hire over \$11,000 it was eleven percent. From \$12,000 to \$12,999, it was twelve percent. And then for every thousand dollar increase it's one percent increase to a maximum of fifteen percent of the first year's income.'

He agreed to the terms of the payment if we could find a gentleman who he would hire. \* \* \* The following days I pursued to present applicants for the position.

Apostolopoulos further stated that he prepared a job order form as a result of his conversation with Wellman. This form, which indicated pertinent information about the job to be filled, was then circulated among various job counselors in plaintiff's employ. Apostolopoulos also identified an introduction or referral slip which was given to Al Firth, an applicant, by one of the job counselors who had arranged an interview between Wellman and Firth.

Alfred Firth testified that he was interviewed by Glenn Wellman on December 16, 1968, concerning a manufacturing manager position with Wellman's company. Firth had learned of the job opportunity solely through Business Men's Clearing House and, when he first contacted Wellman, indicated that he had been referred by plaintiff. Firth was eventually hired by Wellman and started work on February 15, 1969, at a salary of \$16,000 per year. Firth remained in Wellman's employ until early April 1969 when he resigned at Wellman's request.

Glenn Wellman testified that he was the president of the Wellco Chemical Company and had charge of hiring and firing employees of the company. He indicated that his practice was to recruit solely through newspaper ads and that he never hired personnel through employment agencies. He could not recall having spoken in 1968 to anyone from Business Men's Clearing House. He admitted having interviewed and hired Alfred Firth in late 1968 and early 1969, but denied that Firth told him of the referral by plaintiff. Wellman further stated that he did not know how Firth



had learned of the job in question.

Plaintiff initially contends that the court erred by excluding evidence concerning an exchange of correspondence between plaintiff's attorneys and Glenn Wellman wherein Wellman admitted that he had contracted with Business Men's Clearing House. We believe it unnecessary to consider this contention, however, because in our view the evidence which was adduced on trial was entirely sufficient to require a verdict in plaintiff's favor.

Strong evidence of the contractual agreement between plaintiff and defendant was introduced through the detailed testimony of George Apostolopoulos and Apostolopoulos' testimony was substantially corroborated by that of Alfred Firth. The only conflicting evidence was introduced through the testimony of Glenn Wellman. Wellman's testimony, as compared with that of Apostolopoulos and Firth, was quite equivocal and consisted largely of unfounded accusations about the sharp practices of employment agencies in general. It is our view, after having carefully examined the entire record, that plaintiff clearly preponderated and should have prevailed in the trial court.

Accordingly, we reverse the judgment of the trial court and remand the cause with directions that judgment be entered in favor of plaintiff in the amount of \$2400.

JUDGMENT REVERSED AND  
CAUSE REMANDED.

BURKE, J., and STAMOS, J., concur.



No. 56189



6 I.A.<sup>3</sup> 947

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
vs. )  
 )  
JAMES SOLOMON, )  
 )  
Defendant-Appellant. )

APPEAL FROM THE  
CIRCUIT COURT OF  
COOK COUNTY

HONORABLE  
L. SHELDON BROWN,  
PRESIDING.

ABST.

MR. PRESIDING JUSTICE LORENZ delivered the opinion of the court:

After a jury trial, defendant was found guilty of the offense of jumping bail in connection with an indictment for burglary. He was sentenced to a term of two to four years. The defendant then pled guilty to the burglary charge and received a concurrent two to four year sentence. This appeal, however, is taken only from the conviction for bail jumping.

Defendant was charged with the offense of burglary. The records of the Criminal Division of the Cook County Court reveal that defendant's case was called on September 25, 1967. On that date, the case was continued until September 28, 1967. The case was called on September 28 and continued again until September 29, 1967. Defendant appeared in court on both September 25 and September 28. However, defendant failed to appear on September 29, 1967, and his bond was forfeited on the State's motion. A notice of bond forfeiture was mailed to defendant at his place of residence requiring him to appear before the Presiding Judge of the Criminal Division on November 24, 1967. Defendant's residence was at 2746 W. Madison Street in Chicago, Illinois. A judgment on the bond forfeiture was entered when defendant failed to appear on the designated date.

Defendant was subsequently arrested and brought to trial for violation of bail bond. Ill. Rev. Stat. 1965, ch.38, par. 32-10. Defendant testified on his own behalf as the sole defense witness. The State's witnesses included Edward Garon, a Clerk of the Cook





County Circuit Court who testified that he was present in the courtroom of Judge Reginald J. Holzer on September 25, 1967. He stated that the case was called and continued to September 28, 1967, and on that date continued again until September 29, 1967. The case was called on September 29, but defendant was not present in court. Mr. Garon also testified that the notice of bond forfeiture was mailed to defendant at 2746 W. Madison Street, Chicago, in the regular course of the court's business, and that there was nothing in the file to indicate it had not been delivered.

Thomas Flynn, the police officer who had arrested defendant on the original burglary charge, also testified for the State that defendant was not present in court when the case was called on September 29, 1967. Another Chicago policeman, Earl Washington, testified that he was the officer who arrested defendant on April 14, 1969, and at that time defendant gave the officer his name as Brady Wilson. Defendant's true identity was established through his police record after fingerprinting.

Defendant testified that when the case was called on September 28, it was continued to October 29, 1967, and not September 29, 1967, and that he did not appear on October 29, 1967, because that day fell on a Sunday. However, he went to the court building on the following day, October 30, 1967, and had a conversation with a clerk in the Clerk's office, but he did not learn anything further about his court date. He never received the copy of the notice of bond forfeiture although he had lived at 2746 W. Madison Street for several years. Defendant also admitted that he had been convicted of a felony and had served time in the penitentiary.

After the State completed its cross-examination of the defendant, the court directed a brief series of questions to him. These questions, from which additional facts were elicited from defendant, concerned his alleged trip to the Criminal Court Building





on October 30, 1967. Defendant stated that he checked the bulletin board in the lobby when he arrived at the Court Building on October 30. His name was not on the board. Defendant testified that he had then gone to Judge Holzer's courtroom and had a conversation there with a clerk. Defendant stated that he was informed by the clerk that his name was not on the court call for that day. He then went to the clerk's office where he was told that he would be notified of his court date by mail. It was on the strength of this alleged statement by the clerk that defendant did not take any further initiative to determine when he was to appear in court.

The sole issue raised by defendant on appeal is the propriety of the examination by the court. It is urged that defendant did not receive a fair trial because the judge's questions prejudiced him in the eyes of the jury and demonstrated the judge's partiality for the State's case. Defendant maintains that the court's interrogation of defendant served only to repeat and emphasize prior testimony which pointed to his guilt. We do not agree.

It is a well established rule of law in this State that a judge is not merely a moderator at the trial level. A trial judge may ask questions of a defendant on the witness stand to elicit the truth and to clarify contentions made by the witness. People v. Smith (1960), 18 Ill.2d 547, 553, 165 N.E.2d 333, 336. There are, however, certain restraints placed upon a trial judge's right to question witnesses. The propriety of such an examination must be determined by the circumstances of each case. This right to question rests largely in the discretion of the trial court. At the same time, the circumstances of a particular case must be weighed to insure that the defendant is not prejudiced. People v. Hopkins (1963), 29 Ill.2d 260, 265-266, 194 N.E.2d 213, 216.

From our examination of the record, we find that the trial court was acting within the proper boundaries of its discretion when it conducted the brief examination of defendant. The court was



trying to clarify defendant's testimony which was somewhat sketchy about what defendant did while he was allegedly at the Court Building on October 30, 1967. The judge's limited questioning did clarify the testimony and also brought out additional facts for the jury's consideration, which included defendant's familiarity with procedures at the Criminal Court Building. In this regard, it cannot be said that the court's questions merely reiterated prior testimony. The court's questioning was not prejudicial to the defendant nor did it impugn his credibility, and we find no grounds herein warranting a reversal. Defendant also points to the court's denial of his motion for a new trial as evidence of the court's prejudice, but we find no merit in this proposition.

Affirmed.

DRUCKER and ENGLISH, JJ., concur.

[ABSTRACT ONLY]



*Page 1*

6 I.A.<sup>3</sup> 1053



55490

RICHARD PUSZCZEWICZ,  
Plaintiff-Appellant,  
v.

AMERICAN OIL COMPANY, a Maryland  
corporation,  
Defendant-Appellee.

) APPEAL FROM  
)  
) CIRCUIT COURT,  
)  
) COOK COUNTY.  
)  
) HON. WALTER DAHL,  
) Presiding.

**ABST.**

MR. JUSTICE BURKE delivered the opinion of the court:

This is an appeal from an order dismissing the amended complaint.

On April 10, 1969, Richard Puszczevicz, the plaintiff, agreed to lease from the American Oil Co., the defendant, a gas station for a term commencing April 1, 1969, and ending September 30, 1969, and for four successive terms of one year each with the right to cancel by lessor upon written notice. On July 21, 1970, the defendant gave written notice to the plaintiff informing him of its intention to terminate the lease as of September 30, 1970. The plaintiff thereafter instituted this action seeking an injunction restraining the defendant from interfering with his use of the premises, and a declaratory judgment determining the rights of the parties under the lease. The court, in dismissing the complaint, said that pursuant to the terms of the lease the defendant had an unqualified right to cancel by giving written notice 60 days prior to the 30th of September 1970.

The provisions of the lease which are pertinent to the resolution of this controversy are the habendum clause and paragraph 8. The habendum clause provides that the term of the lease is from April 1, 1969, to September 30, 1969, with four successive terms of one year each. Upon giving written notice 60 days in advance, the lessor has the right to terminate the lease as of the expiration



date of its initial term, or any anniversary thereof. This clause further provides that the lessee may cancel at anytime by giving 30 days prior written notice. Paragraph 8 states that the lessor shall have no right to cancel the lease except upon the grounds enumerated therein. The notice requirements under this paragraph are 30 days, 90 days, and no notice, depending on the specific covenant or covenants breached.

Plaintiff contends that the lease provisions are contradictory and that parol evidence should be received to clarify the ambiguities. In the alternative he contends that paragraph 8 constitutes a limitation on the lessor's termination right contained in the habendum clause which may be exercised only when the lessee breaches the lease. We do not believe that the pertinent provisions are ambiguous or contradictory or warrant a construction which precludes the lessor's right to terminate for a ground other than the lessee's breach of the covenants and other terms of the lease.

Written agreements are to be construed so as to give meaning to all parts thereby avoiding constructions which render some provisions superfluous. It is assumed that everything in a contract has been inserted deliberately and for a specific purpose. *Industrial C. Corp. v. E. J. Brach & Sons*, 92 Ill.App.2d 163, 235 N.E.2d 857. Paragraph 8 of this lease enumerates the grounds upon which, and the notice requirements to be satisfied in the event of the lessor's election to cancel at anytime. The habendum clause however, relates to termination and notice requirements where either the lessor or lessee decide to terminate without giving a reason. As noted earlier, this provision states that the lessor may terminate only as of the expiration date of the initial term, or any anniversary thereof, (provided the





written notice has been served 60 days in advance) and the lessee may terminate at anytime (provided written notice has been served 30 days in advance). What is significant is that the habendum clause, unlike paragraph 8, does not specify any conditions for either the lessee or lessor exercising the termination right, and neither provision contains language indicating that one was intended to be a limitation on the other. Furthermore, the lessor's termination right contained in the habendum clause may be exercised only at certain times, unlike the termination rights enumerated in paragraph 8, which may be exercised at anytime there is a breach on the part of the lessee. Were we to construe paragraph 8 as a limitation on the habendum clause, the 60 day notice requirement contained therein would be rendered superfluous due to the fact that paragraph 8 specifies 90 days, 30 days, and no notice, depending on the particular breach. Nowhere does this paragraph specify a 60 day notice requirement as does the habendum clause. If it were intended that paragraph 8 limit the habendum clause the parties would have so specified and they would not have inserted a 60 day notice requirement in the habendum clause. We conclude that the termination rights in the habendum clause are separate and independent of the rights and limitations in paragraph 8.

It is our opinion that the quoted portions of the lease are consistent and not ambiguous. By virtue of the habendum clause the defendant lessor had the right to terminate as of the 30th of September 1970, which it did by a notice served in due time. For these reasons the judgment of dismissal is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J., and LYONS, J. concur.



56185



I.A.<sup>3</sup> 1057

J. EDWARD JONES,  
Plaintiff-Appellant,

v.

WILLIAM J. KREISH and  
TERESA S. KREISH,

Defendants-Appellees.

)  
)  
) APPEAL FROM THE CIRCUIT  
)  
) COURT OF COOK COUNTY.  
)

) Hon. Ronald Crane,  
) Presiding.  
)

ABST.

MR. JUSTICE McNAMARA delivered the opinion of the court:

On February 11, 1971, plaintiff obtained a judgment by confession against defendants in the sum of \$762.62 for unpaid rent, interest and attorney's fees arising out of a lease executed by the parties on October 1, 1970. After obtaining the judgment by confession, plaintiff brought proceedings to confirm the judgment. Ill.Rev.Stat, 1967, ch.62, par.82. On March 16, 1971, defendants appeared, and the confirmation proceedings took place. After hearing evidence, the court found in favor of the defendants. Plaintiff brings this appeal.

Defendants have not filed an appearance or brief in this court. A reviewing court may, under such circumstances, reverse the judgment of the trial court without further explanation. Gaskin v. Gray, 2 Ill.App.3d 1074, 278 N.E.2d 188. Upon consideration of the entire record, we have decided to determine the substantive issues. Lynch v. Wolverine Insurance Co., 126 Ill.App.2d 192, 261 N.E.2d 466.

At the confirmation proceedings, the following pertinent evidence was adduced. The plaintiff landlord testified that defendants had examined the property in question without plaintiff's knowledge, liked it and notified plaintiff they would like to rent it. Defendants signed a lease at a monthly rental of \$165 and took possession on October 1, 1970, but did not move their family in. The lease provided that defendants had examined the premises and were satisfied with its condition. However, plaintiff agreed to repair two doors, two windows, the kitchen ceiling, and have the second floor painted. Plaintiff also installed new electric fixtures and switches, and had a new hot water pump installed. In response to a complaint by defendants in



January 1971, plaintiff had a gas burner installed at a cost of \$290. In November 1970, defendants had written to plaintiff that they would not pay November rent until the men who had made the repairs cleaned the mess. Plaintiff offered into evidence the paid receipts for the new equipment and for the repairs. Defendants did not pay rent for four months, and then in March 1971, after the confirmation proceedings had been commenced, paid one month's rent.

Defendant William J. Kreish testified that he did not pay rent because it was not a fit place to bring his children. The furnace did not work, and the house was freezing. On the day before trial, there was a foot or two of water in the basement.

Plaintiff requested that he be permitted to offer rebuttal evidence because defendant had not told the truth. The trial judge refused to allow plaintiff to offer rebuttal evidence. The judge commented that the place evidently was not fit to live in, and found for defendants.

While plaintiff raises several issues on appeal, we deem it necessary to consider only his contention that the trial court committed reversible error in refusing to permit him to offer rebuttal evidence. It is fundamental that a party is entitled to introduce evidence to rebut that of his opponent. Pellico v. E. L. Ramm Co., 68 Ill.App.2d 322, 216 N.E.2d 258; Loftus v. Loftus, 134 Ill.App. 360. In the instant case, the refusal by the trial court of plaintiff's request to introduce rebuttal evidence was improper, and constituted an abuse of its discretion. The refusal becomes more significant when it is noted that the court based its findings in favor of the defendants upon the testimony of one of the defendants that the home was uninhabitable.

Accordingly, the judgment of the circuit court is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

McGLOON, P.J., and DEMPSEY, J., concur.





6 I.A.<sup>3</sup> 1074



53943

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, ) APPEAL FROM THE CIRCUIT  
 )  
v. ) COURT OF COOK COUNTY.  
 )  
HAMP SMART, ) Hon. Felix M. Bouscio  
 ) Presiding.  
Defendant-Appellant. )

ABST.

MR. JUSTICE McNAMARA delivered the opinion of the court:

Defendant, Hamp Smart, along with one other person, was indicted for the crime of grand theft. At arraignment, defendant pleaded not guilty. On the date of trial, defendant, represented by privately retained counsel, withdrew his plea of not guilty, entered a plea of guilty to the charge of grand theft and was sentenced to a term of one to five years. Approximately two months later, defendant, represented by new counsel, made a motion for a new trial and requested that he be permitted to withdraw his plea of guilty on the grounds that it was entered as a result of the misapprehension that he was going to be placed on probation. After a hearing, the trial judge denied the motion to withdraw the guilty plea. On appeal defendant contends that the court erred in refusing to allow him to withdraw the plea of guilty. Defendant also argues that the court abused its discretion in not granting probation to him. At the hearing on the motion to withdraw the plea of guilty, the following pertinent evidence was adduced.

Mr. Seymour Vishny, an attorney, testified for the State that he was defendant's privately retained counsel. At an initial conference, defendant had informed him that he had a prior conviction for a Selective Service violation. Vishny told defendant that probation for the instant charge was a possibility, but did not promise it. The prosecutor first assigned to the case told Vishny that, under the circumstances, the State probably would not oppose probation. Subsequently, another prosecutor, Morton Friedman, was assigned to the case, and he informed Vishny that, because of defendant's prior criminal record, the State was opposed to probation. On the day of trial, Vishny told defendant that,



reached in 1911

reached in 1912

reached in 1913

reached in 1914

reached in 1915

reached in 1916

reached in 1917

reached in 1918

reached in 1919

reached in 1920

reached in 1921

because the evidence would show that defendant was arrested while driving a stolen car and had signed a confession admitting guilt, defendant should plead guilty. Vishny also informed defendant that in exchange, the State was willing to nolle two other indictments pending against him, accept a sentence of one to five years, and not object to the entry of a stay of mittimus until defendant's child was born. Defendant agreed, and 45 minutes later pleaded guilty.

Assistant State's Attorney Friedman testified that he also had a conversation with defendant in the presence of defense counsel prior to the entry of the plea of guilty. Friedman told defendant that in light of his prior record probation was an impossibility and that defendant would have to go to the penitentiary.

Defendant testified that Mr. Vishny promised that he would get probation, and persisted in that promise up to a few minutes before he pleaded guilty. However, defendant testified that at the time he pleaded guilty he knew he would not get probation. Defendant pleaded guilty on the advice of his attorney.

Defendant first contends that the court erred in not allowing him to withdraw his plea of guilty. Defendant argues that he pleaded guilty as the result of a misapprehension of the consequences caused by the conduct of his attorney and the prosecutor. People v. Morreale, 412 Ill. 528, 107 N.E.2d 721; People v. Hancasky, 410 Ill. 148, 101 N.E.2d 575. Defendant's argument is unsupported by the record and is without merit. The testimony adduced at the hearing, including that of defendant, overwhelmingly established that defendant was fully informed of the consequences of his plea of guilty prior to its entry. The court correctly denied defendant's motion to withdraw the plea of guilty.

Defendant's next contention that the trial court abused its discretion in not allowing him probation is also without merit. In the instant case, in addition to the prior conviction for a Selective Service violation already mentioned, the record indicates



that defendant previously had received penitentiary sentences for a narcotics offense and for grand larceny. Granting or denying probation is within the discretion of the trial court. People v. Smith, 62 Ill.App.2d 73, 210 N.E.2d 574. The court did not abuse its discretion in the case at bar.

Similarly, the sentence imposed by the trial judge is not excessive. See People v. Lobb, 1 Ill.App.3d 239, 273 N.E.2d 206. Accordingly, the judgment is affirmed.

Judgment affirmed.

McGLOON, P.J., and DEMPSEY, J., concur.













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